

75 Am. Jur. 2d Trespass VI A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VI. Criminal Liability

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References


West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A.L.R. Library

A.L.R. Index, Criminal Law

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  76 to 79

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75 Am. Jur. 2d Trespass § 133

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VI. Criminal Liability

A. In General

§ 133. Common law and statutory offense of criminal trespass distinguished

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

Criminal trespass is for the most part a statutory creation.¹ While certain acts of trespass were regarded as crimes at common law, the distinction between trespasses for which there was a private remedy only and those for which there might be a public prosecution was not laid down with much accuracy or precision.² Because the common law of trespass was viewed as a private wrong, and not an indictable offense, the imposition of criminal sanctions against a trespass must be under the authority of a statute.³

A statute may define a trespass as a petty, disorderly persons offense.⁴

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Footnotes

- 1 [In re Appeal No. 631 \(77\) From Dist. Court of Montgomery County, Juvenile Division, 282 Md. 223, 383 A.2d 684 \(1978\).](#)
- 2 [People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 \(1961\); White v. Mississippi Power & Light Co., 196 So. 2d 343, 30 A.L.R.3d 754 \(Miss. 1967\).](#)
- 3 [State v. Zarin, 220 N.J. Super. 99, 531 A.2d 411 \(Law Div. 1987\).](#)
- 4 [State in Interest of L.E.W., 239 N.J. Super. 65, 570 A.2d 1019 \(App. Div. 1990\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 134

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VI. Criminal Liability

A. In General

§ 134. Municipal authority to penalize trespassers; ordinances, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A municipal corporation may have statutory authority to penalize one entering private property against the owner's consent.¹ Where a general trespass statute is applicable, no authority requires that a municipality charge a trespasser under a more specific ordinance governing trespassing in parking lots rather than a general trespass statute, simply because the trespass in fact took place in a parking lot.²

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Footnotes

- 1 [In re Rudolfo A.](#), 110 Cal. App. 3d 845, 168 Cal. Rptr. 338 (2d Dist. 1980); [State v. Farris](#), 412 So. 2d 1039 (La. 1982); [City of Eugene v. Lincoln](#), 183 Or. App. 36, 50 P.3d 1253 (2002); [City of Seattle v. Rice](#), 93 Wash. 2d 728, 612 P.2d 792 (1980).
- 2 [Fardig v. Municipality of Anchorage](#), 785 P.2d 911 (Alaska Ct. App. 1990), on reh'g, 803 P.2d 879 (Alaska Ct. App. 1990).

End of Document

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75 Am. Jur. 2d Trespass § 135

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VI. Criminal Liability

A. In General

§ 135. Degrees of trespass; lesser-included offenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A statutory scheme may provide for varying degrees of trespass,¹ such as trespass in the first degree,² second degree³ or third degree, depending upon the circumstances.⁴

A statutory scheme which defines four degrees of trespass with distinguishably different essential elements, such that simple trespass is not a lesser-included offense of any of the three degrees of criminal trespass, defines separate violations rather than separate classes of trespasser.⁵

First-degree trespass is a lesser-included offense of felonious breaking or entering, as unlike felonious breaking or entering, first-degree trespass does not include the element of felonious intent but rather merely requires evidence that the defendant entered or remained on the premises or in a building of another without authorization.⁶ Similarly, intent to commit a crime is an essential element of burglary, and it is this element of criminal intent that separates burglary in the second degree from its lesser-included offense of trespass in the first degree.⁷ It may be that the offense of criminal trespass may be established by proof of the facts of burglary of a habitation, less proof of the specific intent to commit theft.⁸

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Footnotes

- ¹ [State v. Steinmann](#), 20 Conn. App. 599, 569 A.2d 557 (1990); [People v. Schmid](#), 124 A.D.2d 896, 508 N.Y.S.2d 314 (3d Dep't 1986); [City of Sunnyside v. Lopez](#), 50 Wash. App. 786, 751 P.2d 313 (Div. 3 1988).
- ² [State v. Martone](#), 160 Conn. App. 315, 125 A.3d 590 (2015); [State v. Hill](#), 497 S.W.3d 391 (Mo. Ct. App. E.D. 2016); [State v. Lucero](#), 265 Or. App. 328, 335 P.3d 1275 (2014).

Crime of criminal trespass is elevated to the first degree if the property at issue is a dwelling. [State v. Davis](#), 281 Or. App. 855, 385 P.3d 1245 (2016).

3 [People v. Barnes](#), 26 N.Y.3d 986, 19 N.Y.S.3d 471, 41 N.E.3d 336 (2015); [State v. Joseph](#), 195 Wash. App. 737, 381 P.3d 187 (Div. 3 2016), review granted, 187 Wash. 2d 1009, 388 P.3d 497 (2017) and aff'd, 189 Wash. 2d 645, 405 P.3d 993 (2017).

4 [People v. Moore](#), 5 N.Y.3d 725, 800 N.Y.S.2d 49, 833 N.E.2d 192 (2005).

5 [State v. Steinmann](#), 20 Conn. App. 599, 569 A.2d 557 (1990).

6 [State v. Lucas](#), 234 N.C. App. 247, 758 S.E.2d 672 (2014).

7 [J.N.C.B. v. Juvenile Officer](#), 403 S.W.3d 120 (Mo. Ct. App. W.D. 2013).

8 [Goad v. State](#), 354 S.W.3d 443 (Tex. Crim. App. 2011).

End of Document

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75 Am. Jur. 2d Trespass § 136

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VI. Criminal Liability

A. In General

§ 136. Purpose of criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

The legislative purposes of some criminal trespass statutes is to protect any possessor of land, whether titleholder or not, from intrusions by unwanted persons,¹ to protect the privacy interests of the occupier,² to punish those who willfully or without bona fide claim of right commit acts of trespass on the land of another,³ and to prevent violence or threats of violence.⁴

The purpose of a home invasion statute is to protect persons in their homes⁵ from incidents in which an armed person, once inside, assaults and traumatizes the occupants.⁶ However, the statute defining the offense of home invasion is not intended to apply to cases of domestic violence involving married couples.⁷

Observation:

A criminal trespass statute may not be used to resolve a civil property dispute.⁸

Footnotes

- 1 State v. Delgado, 19 Conn. App. 245, 562 A.2d 539 (1989); People v. Wyant, 171 Ill. App. 3d 306, 121 Ill. Dec. 533, 525 N.E.2d 591 (3d Dist. 1988).
- Criminal trespass statutes are intended to protect the rights of those in lawful control of the property to forbid entrance by those whom they are unwilling to receive and to exclude them if, having entered, those in control see fit to command them to leave. *Com. v. Hood*, 389 Mass. 581, 452 N.E.2d 188 (1983).
- 2 *McCuller v. State*, 999 S.W.2d 801 (Tex. App. Tyler 1999), petition for discretionary review refused, (June 16, 1999).
- 3 *Willis v. State*, 983 N.E.2d 670 (Ind. Ct. App. 2013).
- 4 *People v. Wyant*, 171 Ill. App. 3d 306, 121 Ill. Dec. 533, 525 N.E.2d 591 (3d Dist. 1988).
- 5 *People v. Kolls*, 179 Ill. App. 3d 652, 128 Ill. Dec. 491, 534 N.E.2d 673 (2d Dist. 1989).
- As to home invasion statute, generally, see § 165.
- 6 *Com. v. Mahar*, 430 Mass. 643, 722 N.E.2d 461 (2000).
- 7 *People v. Moulton*, 282 Ill. App. 3d 102, 218 Ill. Dec. 246, 668 N.E.2d 1078 (3d Dist. 1996).
- 8 Matter of Appeal in Maricopa County, Juvenile Action No. JV-512490, 189 Ariz. 318, 942 P.2d 477 (Ct. App. Div. 1 1997); *State v. Larason*, 75 Ohio L. Abs. 211, 143 N.E.2d 502 (C.P. 1956).

End of Document

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75 Am. Jur. 2d Trespass VI B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VI. Criminal Liability

B. Application of Statutes

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 84

A.L.R. Library

A.L.R. Index, Criminal Law

A.L.R. Index, Defenses

A.L.R. Index, Intentional, Wilful, and Wanton Acts

A.L.R. Index, Notice and Knowledge

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  76 to 84

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75 Am. Jur. 2d Trespass § 137

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


1. Construction of Terms

a. In General

§ 137. Construction of terms in criminal trespass statutes, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

In applying a criminal trespass statute, courts generally must follow the plain and unambiguous meaning of the statutory language, and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.¹

Penal statutes governing trespass are to be strictly construed² against the state and in favor of the defendant.³ A criminal trespass statute which prohibits unlawfully remaining upon the land of another after being forbidden to do so, while on its face may appear strikingly similar to the common law civil trespass, is a penal statute and, therefore, is generally construed to require a willful trespass.⁴

A statute which prohibits "knowing interference with the use of another's property" does not require that the defendant be actually on the property where the defendant was clearly interfering with access to the property.⁵

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Footnotes

¹ U.S. v. Albertini, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985).

² State v. Larason, 75 Ohio L. Abs. 211, 143 N.E.2d 502 (C.P. 1956); State v. Dixon, 169 Vt. 15, 725 A.2d 920 (1999).

- 3 State v. Zarin, 220 N.J. Super. 99, 531 A.2d 411 (Law Div. 1987); State v. Dixon, 169 Vt. 15, 725 A.2d 920 (1999).
- 4 Reed v. Com., 6 Va. App. 65, 366 S.E.2d 274 (1988).
- 5 Kerr v. State, 193 Ga. App. 165, 387 S.E.2d 355 (1989).

End of Document

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75 Am. Jur. 2d Trespass § 138

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


1. Construction of Terms

a. In General

§ 138. Exemptions from criminal trespass statute

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

Criminal trespass statutes have, in some jurisdictions, been construed to exempt from prosecution union representatives who, in accord with a collective bargaining agreement, are conducting safety inspections and preparing steward's reports at a construction jobsite and, thus, are engaged in lawful union activity.¹ In construing a criminal trespass statute which excepts from its scope "any lawful activity for the purpose of engaging in any organized effort on behalf of any labor union," a court properly may conclude that the legislature, in dealing with trespasses, specifically subordinated the rights of the property owner to those of persons engaged in lawful labor activities such that an employer could not enjoin the peaceful union picketing of a shopping center.²

Because there is no legitimate need for a farmer to deny a migrant worker living on the farmer's property the opportunity for aid available from federal, state, or local services, or from recognized charitable groups seeking to assist him or her, some state criminal trespass statutes do not apply to representatives of such agencies and organizations entering such property to perform their duties.³

Where a criminal trespass statute expressly exempts any person living on the land with permission of the owner or his or her agent having apparent authority, whether that permission may be considered as a license or some other arrangement does not affect such person's status; and, conversely, if a person does not live on the land, permission to be there in any form does not bring him or her within the scope of the statutory exemption.⁴

Footnotes

- 1 [In re Catalano](#), 29 Cal. 3d 1, 171 Cal. Rptr. 667, 623 P.2d 228 (1981).
- 2 [In re Catalano](#), 29 Cal. 3d 1, 171 Cal. Rptr. 667, 623 P.2d 228 (1981).
- 3 [State v. Shack](#), 58 N.J. 297, 277 A.2d 369 (1971) (ownership of real property does not include the right to bar access to governmental services available to migrant workers).
- 4 [People v. Mortenson](#), 178 Ill. App. 3d 871, 128 Ill. Dec. 46, 533 N.E.2d 1134 (2d Dist. 1989).

End of Document

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75 Am. Jur. 2d Trespass § 139

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


1. Construction of Terms

a. In General

§ 139. Exemptions from criminal trespass statute—Property open to public or public grounds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

Property is "open to the public," and not subject to criminal trespass, when some characteristic of the property objectively would cause a reasonable person to believe that he or she is free to enter or remain on the property without permission, even if the owner intends the property to be private and requires permission to be there.¹

As a general rule, a person has a privilege to enter and be upon the public areas of public property,² although the rule is not all encompassing, and a criminal trespass can be committed on public land under certain circumstances.³ Further, it is not the case that all property owned by the government is "open to the public," for purposes of a criminal trespass statute, as certain areas of publicly owned buildings may be restricted from public use by a locked door or a front desk, much like the common areas of privately owned buildings.⁴

In a trespass case involving public grounds, the state satisfies the burden of the "property of another" element of a criminal trespass statute by proving, beyond a reasonable doubt, that the complainant has a greater right of possession of the property than does the accused.⁵

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Footnotes

¹ [State v. Moore](#), 264 Or. App. 86, 331 P.3d 1027 (2014).

² [Cleveland v. Dickerson](#), 2016-Ohio-806, 60 N.E.3d 686 (Ohio Ct. App. 8th Dist. Cuyahoga County 2016).

- 3 [People v. Barnes](#), 26 N.Y.3d 986, 19 N.Y.S.3d 471, 41 N.E.3d 336 (2015); [Cleveland v. Dickerson](#), 2016-Ohio-806, 60 N.E.3d 686 (Ohio Ct. App. 8th Dist. Cuyahoga County 2016).
- 4 [People v. Barnes](#), 26 N.Y.3d 986, 19 N.Y.S.3d 471, 41 N.E.3d 336 (2015).
- 5 [Wilson v. State](#), 504 S.W.3d 337 (Tex. App. Beaumont 2016), petition for discretionary review refused, (Apr. 26, 2017).

End of Document

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75 Am. Jur. 2d Trespass § 140

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(1) In General

§ 140. Constitutionality of criminal trespass statutes, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A.L.R. Library

[Validity, construction, and application of Freedom of Access to Clinic Entrances Act \(FACE\) \(18 U.S.C.A. sec. 248\), 134 A.L.R. Fed. 507](#)

The proposition that in applying criminal statutes courts generally must follow the plain and unambiguous meaning of the statutory language, and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language, is not altered simply because the application of a trespass statute is challenged on constitutional grounds.¹

Prohibitions against trespass upon real property after warning is given are constitutional.²

Even where different classes of trespassers are defined by various trespass statutes, reasonable classifications do not violate the right to equal protection under the law.³

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Footnotes

- 1 [U.S. v. Albertini, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 \(1985\).](#)
- 2 [Corn v. State, 332 So. 2d 4 \(Fla. 1976\).](#)
- 3 [State v. Steinmann, 20 Conn. App. 599, 569 A.2d 557 \(1990\).](#)
As to the degrees of trespass, generally, see [§ 135](#).

End of Document

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75 Am. Jur. 2d Trespass § 141

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(1) In General

§ 141. Constitutionality of criminal trespass statutes under First Amendment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A.L.R. Library

[Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773](#)

[Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551](#)

The criminal trespass statute may be constitutionally applied, even to those who trespass to communicate, as long as it is applied without discrimination and is not used to purposefully suppress speech.¹ The First Amendment is not a license to trespass.² People who want to propagandize protests or views have no constitutional right to do so whenever, however, and wherever they please.³ Application and enforcement of trespass laws by the government should not have the effect of transforming private interference with free speech activities into state interference; to so hold would preclude the private property owner from enforcing the rights to exclude others and convert his or her property into a public forum, open to the free use of any person exercising a First Amendment right.⁴

Practice Tip:

It is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.⁵

Trespassing statutes do not necessarily violate the free exercise clause of the First Amendment⁶ or infringe on the freedom of association under the First Amendment or the right to freedom of movement in intrastate travel in violation of the 14th Amendment.⁷

A defendant's First Amendment right to petition the government for redress of a grievance was not infringed when a defendant is charged with trespass for reentering a government building after having previously been warned not to return, at least under a statute prohibiting reentry by a defendant who has been put on notice not to return regardless of whether the defendant seeks to engage in speech upon his return, so that the statute punishes only the defendant's nonexpressive conduct.⁸

CUMULATIVE SUPPLEMENT

Cases:

Iowa's agricultural production facility fraud statute was not narrowly tailed to serve Iowa's interests of private property and biosecurity, and thus, could not survive strict scrutiny under the First Amendment's speech protections; governor and related parties produced no evidence that the prohibitions of statute were actually necessary to protect perceived harms to property and biosecurity, other existing laws concerning trespass and biosecurity, or amendments to such laws, could be used to protect such interests, statute did nothing to deter the exact same alleged harms from individuals who proceeded to access or enter a facility without false pretense or misrepresentation, and it included no limiting features whatsoever, allowing it to apply even to the most innocent of circumstances. [U.S. Const. Amend. 1](#); [Iowa Code Ann. §§ 716.7\(2\), 717A.2, 717A.3A, 717A.4](#). [Animal Legal Defense Fund v. Reynolds](#), 353 F. Supp. 3d 812 (S.D. Iowa 2019).

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Footnotes

- 1 [Thompson v. State](#), 12 S.W.3d 915 (Tex. App. Beaumont 2000), petition for discretionary review refused, (Sept. 13, 2000).
- 2 [Belluomo v. KAKE TV & Radio, Inc.](#), 3 Kan. App. 2d 461, 596 P.2d 832 (1979).
- 3 [Corn v. State](#), 332 So. 2d 4 (Fla. 1976); [Brooks v. State](#), 170 Ga. App. 440, 317 S.E.2d 552 (1984).
- 4 [City of Sunnyside v. Lopez](#), 50 Wash. App. 786, 751 P.2d 313 (Div. 3 1988).
- 5 [U.S. v. Powell](#), 563 A.2d 1086 (D.C. 1989).

- 6 [Com. v. Cartwright](#), 447 Mass. 1015, 856 N.E.2d 177 (2006) (an individual's religious belief does excuse him or her from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate).
- 7 [State v. Wood](#), 2004-Ohio-3879, 2004 WL 1631468 (Ohio Ct. App. 4th Dist. Scioto County 2004).
There is no constitutional right to freedom of movement or freedom of worship on private property where there is no license or privilege to be there. [State v. Steinmann](#), 20 Conn. App. 599, 569 A.2d 557 (1990).
- 8 [Pentico v. State](#), 159 Idaho 350, 360 P.3d 359 (Ct. App. 2015).

End of Document

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75 Am. Jur. 2d Trespass § 142

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(1) In General

§ 142. Constitutionality of criminal trespass statutes under First Amendment—Private property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A.L.R. Library

[Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773](#)

[Validity, construction, and application of 18 U.S.C.A. sec. 1382, prohibiting trespass on military installation, 12 A.L.R. Fed. 638](#)

A person is not afforded a First Amendment right to free speech on private property.¹ The characterization of premises as a nonpublic forum for expression has two implications: first, use of that area for protest may contravene the purpose for which the property was dedicated and therefore constitute an unlawful trespass; second, the government's ability to restrict speech in a nonpublic forum is greater and attempts to do so are examined by the courts with minimal scrutiny.²

A criminal trespass statute is not unconstitutionally applied when invoked against persons present on private property, contrary to the wishes of a person in authoritative control of such property, even where such uninvited persons assert First Amendment rights, if there is no showing of discriminatory intent in the invocation of the statute, the property has not been dedicated to

a public use, and the subject matter of the asserted First Amendment rights is unrelated to the nature of, or business activity conducted on, the premises of the private property.³

A number of courts have rejected the contention that demonstrators charged with entering onto private business or utility premises for public demonstration purposes have a legitimate First Amendment right to be on the premises in question.⁴ A health services center is not public in nature, and its parking lot is not public property such that state and federal free speech guarantees foreclose prosecution for trespass under a statute which makes it unlawful for any person, firm, or corporation to commit a trespass upon either public or private property without consent of the owner of the property.⁵ Thus a statute prohibiting criminal trespass to a medical facility, although its effect may be to prevent abortion protestors from advocating their position, does not unconstitutionally restrict their right to express their views on abortion where the medical facility, as defined by statute, is a nonpublic forum.⁶ Furthermore, state constitutional free speech provisions do not extend to protect antiabortion activities conducted on the grounds of a private medical clinic.⁷

The specific invitation extended by physicians, tenants of a professional center, to members of the public to seek their medical expertise is not sufficient to classify the center as open to public use where the center was not the functional equivalent of a public place; thus a pro-life activist, on the premises of a center exclusively reserved for the use of the center, its owners and tenants, and the members of the public transacting business with them, had no constitutional right of access to the center for speech activities.⁸

Observation:

Property does not lose its private character merely because the public is generally invited to use it for designated purposes.⁹

Application of a statute prohibiting persons from entering a military base for a purpose prohibited by lawful regulation does not violate free speech rights.¹⁰ Similarly, the First Amendment does not preclude the conviction, under a federal statute prohibiting trespassing on federal military installations after receiving an order barring entry or reentry, of a demonstrator who trespasses after receiving an order as required by statute¹¹ because a military base is ordinarily not a public forum for First Amendment purposes,¹² unless the military has abandoned any right to exclude civilian traffic.¹³ However, plaintiffs who distributed leaflets inside an open military base, which allowed public traffic on its roadways and provided public facilities, could not be prosecuted for trespass.¹⁴

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Footnotes

- ¹ [State v. Scholberg](#), 395 N.W.2d 454 (Minn. Ct. App. 1986).
- ² [U.S. v. Gilbert](#), 720 F. Supp. 1554 (N.D. Ga. 1989), order aff'd in part, rev'd in part on other grounds, 920 F.2d 878 (11th Cir. 1991).
A church was a "nonpublic forum," for the purposes of a First Amendment free speech challenge to the constitutionality of the offense of criminal trespass as applied to the defendant, who was convicted for

refusing to leave a seminar which he allegedly disrupted by commenting loudly on the speaker's remarks. *Thompson v. State*, 12 S.W.3d 915 (Tex. App. Beaumont 2000), petition for discretionary review refused, (Sept. 13, 2000).

State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973).

Grogan v. U. S., 435 A.2d 1069 (D.C. 1981); *Com. v. Hood*, 389 Mass. 581, 452 N.E.2d 188 (1983); *State v. Brechon*, 352 N.W.2d 745 (Minn. 1984); *State v. Weitzman*, 121 N.H. 83, 427 A.2d 3 (1981); *State v. Koski*, 120 N.H. 112, 411 A.2d 1122 (1980); *State v. Horn*, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), decision aff'd, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

Fardig v. Municipality of Anchorage, 785 P.2d 911 (Alaska Ct. App. 1990), on reh'g, 803 P.2d 879 (Alaska Ct. App. 1990).

State v. Migliorino, 150 Wis. 2d 513, 442 N.W.2d 36 (1989).

State v. Horn, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

City of Sunnyside v. Lopez, 50 Wash. App. 786, 751 P.2d 313 (Div. 3 1988).

A criminal trespass statute was constitutionally applied to a man who first picketed outside a clinic that performed abortions and then entered the building where, since the clinic had more aspects of private property than public property, the defendant's right to free speech was not infringed. *Hoffart v. State*, 686 S.W.2d 259 (Tex. App. Houston 14th Dist. 1985), writ refused, (Feb. 26, 1986).

Fardig v. Municipality of Anchorage, 785 P.2d 911 (Alaska Ct. App. 1990), on reh'g, 803 P.2d 879 (Alaska Ct. App. 1990).

U.S. v. Corrigan, 144 F.3d 763 (11th Cir. 1998).

As to trespass on military installations, see § 169.

U.S. v. Albertini, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985); *U.S. v. Walsh*, 770 F.2d 1490 (9th Cir. 1985).

U.S. v. Albertini, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985).

U.S. v. Albertini, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985).

Flower v. U. S., 407 U.S. 197, 92 S. Ct. 1842, 32 L. Ed. 2d 653 (1972); *CCCO-Western Region v. Fellows*, 359 F. Supp. 644 (N.D. Cal. 1972).

End of Document

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75 Am. Jur. 2d Trespass § 143

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(1) In General

§ 143. Constitutionality of criminal trespass statutes under First Amendment—Public property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A.L.R. Library

[Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 A.L.R.3d 340](#)

The fact that one is exercising First Amendment rights while violating otherwise proper restrictions upon their entry to a public facility does not insulate such persons from prosecution for trespass.¹

The United States Constitution does not forbid a state to control the use of its property for its own lawful nondiscriminatory purpose.² The First Amendment does not guarantee access to property simply because it is owned or controlled by the government.³ The state, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.⁴ Thus nothing in the Federal Constitution prevents a state from even-handed enforcement of its general trespass statute against those refusing to obey a sheriff's order to remove themselves from what amounts to the curtilage of government-owned property.⁵

In the face of actual notice, the public nature of the premises makes no difference, except where the defendant's constitutional rights are in some way impaired.⁶

The order of a store employee, pursuant to company policy, directing the defendants, while seeking signatures on several initiative petitions, to leave the sidewalk between the parking lot of the store and the store's main entrance was not a "lawful order," because using it as a foundation for a criminal prosecution would improperly interfere with the people's right under the state constitution to initiate legislation.⁷ Peaceful picketing in a public place without drawing a crowd or obstructing business or traffic is protected by the First Amendment; however, a peaceful demonstration that interferes with ingress and egress to and from a quasi-public place such as a supermarket may be unprotected and constitute trespass.⁸

Practice Tip:

The purpose of the requirement of the "additional specific factor," establishing a person's lack of a legal right to remain on public property as an element of the government's proof of an unlawful entry, is to protect any First Amendment rights which may be implicated in the defendant's conduct so that the individual's lawful presence is not conditioned upon the mere whim of a public official.⁹

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Footnotes

- 1 [Downer v. State, 375 So. 2d 840 \(Fla. 1979\).](#)
A state's trespass statute applies to public property. [Knox v. Southwest Airlines, 124 F.3d 1103, 38 Fed. R. Serv. 3d 344 \(9th Cir. 1997\).](#)
As to First Amendment rights and criminal trespass statutes pertaining to school property, see [§ 175](#).
- 2 [Brooks v. State, 170 Ga. App. 440, 317 S.E.2d 552 \(1984\).](#)
- 3 [Hemmati v. U.S., 564 A.2d 739 \(D.C. 1989\)](#) (an Iranian citizen had no right to remain in a Senator's office after being told by the agent of the person lawfully in charge to leave).
- 4 [Downer v. State, 375 So. 2d 840 \(Fla. 1979\); Brooks v. State, 170 Ga. App. 440, 317 S.E.2d 552 \(1984\).](#)
- 5 [Downer v. State, 375 So. 2d 840 \(Fla. 1979\).](#)
- 6 [State in Interest of L.E.W., 239 N.J. Super. 65, 570 A.2d 1019 \(App. Div. 1990\).](#)
- 7 [State v. Cargill, 100 Or. App. 336, 786 P.2d 208 \(1990\), aff'd, 316 Or. 492, 851 P.2d 1141 \(1993\).](#)
- 8 [People v. Millhollen, 5 Misc. 3d 810, 786 N.Y.S.2d 703, 194 Ed. Law Rep. 395 \(N.Y. City Ct. 2004\).](#)
- 9 [U.S. v. Powell, 563 A.2d 1086 \(D.C. 1989\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 144

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(2) Vagueness of Terms

§ 144. Vagueness of terms in criminal trespass statutes, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

Where the terms of a criminal trespass statute are of such common understanding and usage that persons of ordinary intelligence are fully able to determine what conduct is proscribed, such terms do not constitute the statute void for vagueness.¹ Thus such a statute is not unconstitutionally vague where any reasonable person can understand that the statute proscribes going on, attempting to go on, and remaining on property belonging to another without authority and after having been forbidden to do so, and where the statute clearly describes the types of property affected and the means by which the prohibition against entry may be communicated.² Similarly, a criminal trespass statute is not substantially overbroad, and thus is not unconstitutional on its face, where the criminal trespass statute regulates conduct and cannot reach a substantial amount of constitutionally protected activity, which is a requisite to facial invalidity on overbreadth grounds, clearly defines who may enforce its provisions by granting enforcement power to an owner or someone with the apparent authority to act for the owner of the property, and does not allow unfettered discretion to those enforcing the statute.³

A criminal trespass statute is not unconstitutionally vague as applied to a defendant when a person of ordinary intelligence would have had no difficulty determining that the defendant's behavior was prohibited by the statute.⁴

It is improper to conclude that a trespass statute is unconstitutionally invalid on its face as applied to public property because the standard to sustain a facial challenge requires that a statute be held impermissibly vague in all of its applications.⁵

A home invasion statute is not unconstitutionally vague based on a defendant's claims that it does not contain an intent requirement, where it is a general intent crime.⁶ Similarly, a home invasion statute, which prohibited a person from entering an inhabited dwelling of another without the permission of the owner, resident, or lawful occupant was not unconstitutionally vague by not specifically requiring that the defendant enter the home of another, as the statute, by its plain language did not criminalize home invasion by forcibly entering his or her own home if the defendant was a lawful occupant or resident of the home.⁷

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Footnotes

- 1 [A.C. v. State, 538 So. 2d 136, 52 Ed. Law Rep. 827 \(Fla. 3d DCA 1989\).](#)
As to vagueness of terms in the criminal trespass statute forbidding trespass on school property, see § 172.
- 2 [A.C. v. State, 538 So. 2d 136, 52 Ed. Law Rep. 827 \(Fla. 3d DCA 1989\); State in Interest of J.A.V., 558 So. 2d 214 \(La. 1990\).](#)
A statute providing that, if a person is told to leave property by the owner or an authorized agent and that person comes back to the same property within a year without permission or invitation, the person will be guilty of criminal trespass was not impermissibly vague, in violation of due process, as applied to the defendant, as the statute provided fair notice to the defendant that, after he was properly notified that he was not authorized to be at specified state properties, his return to such properties without permission or invitation within a year would constitute trespass. [State v. Pentico, 151 Idaho 906, 265 P.3d 519 \(Ct. App. 2011\).](#)
- 3 [Bader v. State, 15 S.W.3d 599 \(Tex. App. Austin 2000\)](#), petition for discretionary review refused, (July 26, 2000).
- 4 [Johnson v. State, 38 N.E.3d 686 \(Ind. Ct. App. 2015\).](#)
- 5 [State v. Korsen, 138 Idaho 706, 69 P.3d 126 \(2003\)](#) (abrogated on other grounds by, [Evans v. Michigan, 568 U.S. 313, 133 S. Ct. 1069, 185 L. Ed. 2d 124 \(2013\)](#)).
- 6 [Truesdell v. State, 129 Nev. 194, 304 P.3d 396, 129 Nev. Adv. Op. No. 20 \(2013\).](#)
As to home invasion statutes, generally, see § 165.
- 7 [Truesdell v. State, 129 Nev. 194, 304 P.3d 396, 129 Nev. Adv. Op. No. 20 \(2013\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 145

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(2) Vagueness of Terms

§ 145. Meaning of term "remain" in criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

The term "remain," in a criminal trespass statute prohibiting unlawful remaining, can be construed according to its ordinary usage; the meaning of remain is to stay, and a stay of any length of time after entry satisfies the requirement that the defendant remain.¹ Under a statute providing that a person commits the crime of criminal trespass by entering or remaining unlawfully in or on premises, the phrase "remain unlawfully" includes the failure to leave premises that are open to the public after being lawfully directed to do so by the person in charge.²

A person will be deemed to remain unlawfully on property when he or she does so without license or privilege,³ and even if the term "remain" were found to be constitutionally vague, proof of entry would suffice.⁴

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Footnotes

- ¹ [Hernandez v. State](#), 783 S.W.2d 764 (Tex. App. San Antonio 1990).
As to unlawfully remaining on property as criminal trespass, generally, see §§ 166, 167.
- ² [State v. Cargill](#), 100 Or. App. 336, 786 P.2d 208 (1990), *aff'd*, 316 Or. 492, 851 P.2d 1141 (1993).
- ³ [People v. Leonard](#), 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 (1984).
- ⁴ [Hernandez v. State](#), 783 S.W.2d 764 (Tex. App. San Antonio 1990).

End of Document

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75 Am. Jur. 2d Trespass § 146

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(2) Vagueness of Terms

§ 146. Meaning of term "lawful order" in criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

A statute providing that a person may be convicted of criminal trespass for remaining in any place in defiance of a lawful order to leave is not unconstitutionally vague on its face for the term "lawful order," where the court had previously construed the statute to mean, with regard to property upon which the general public is invited to enter, that an order to leave the premises is lawful only when the owner has some justification for requesting removal, and where the trespass offense is defined with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.¹ On the other hand, a criminal trespass ordinance which states that a person who, regardless of his or her intent, enters or remains in or upon premises which are at the time open to the public does so with a license and privilege unless he or she defies a lawful order not to enter or remain, personally communicated to him or her by the owner of the premises or some other authorized person, is not sufficiently specific so as to inform persons of reasonable understanding of what conduct is proscribed.² In such a case, the term "lawful order" is unconstitutionally vague in that many questions must be answered to determine if an order is lawful, such as who is considered an authorized person, if the substance of the order is lawful, if there is a valid reason for the order, and how long the order is to be in effect, thus inviting unequal enforcement and giving unfettered discretion to police and to courts.³

Orders of a store employee to a known shoplifter not to enter any of a company's stores or orders that a disruptive person must leave a public hearing are "lawful orders" sufficient for a foundation for a criminal prosecution for trespass.⁴

The order of a store employee, pursuant to company policy, directing the defendants, while seeking signatures on several initiative petitions, to leave the sidewalk between the parking lot of the store and the store's main entrance was not a "lawful order," because using it as a foundation for a criminal prosecution would improperly interfere with the people's right under the state constitution to initiate legislation.⁵

A federal statute, which penalizes entry upon a military installation for a purpose prohibited by law or lawful regulation and which penalizes any presence or reentry upon such an installation after removal therefrom or an order from the commanding officer not to reenter, is not void for vagueness because of the possibility of close questions arising as to whether the communication as given was a lawful order not to reenter or whether it was properly given by a commanding officer.⁶

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Footnotes

- 1 [State v. Chiapetta, 513 A.2d 831 \(Me. 1986\).](#)
As to unlawfully remaining on property as criminal trespass, generally, see §§ [166](#), [167](#).
- 2 [City of Seattle v. Rice, 93 Wash. 2d 728, 612 P.2d 792 \(1980\).](#)
- 3 [City of Seattle v. Rice, 93 Wash. 2d 728, 612 P.2d 792 \(1980\).](#)
- 4 [State v. Cargill, 100 Or. App. 336, 786 P.2d 208 \(1990\), aff'd, 316 Or. 492, 851 P.2d 1141 \(1993\).](#)
- 5 [State v. Cargill, 100 Or. App. 336, 786 P.2d 208 \(1990\), aff'd, 316 Or. 492, 851 P.2d 1141 \(1993\).](#)
- 6 [U.S. v. Douglass, 579 F.2d 545 \(9th Cir. 1978\).](#)
As to trespass on military installations, generally, see § [169](#).

End of Document

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75 Am. Jur. 2d Trespass § 147

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

1. Construction of Terms


b. Constitutionality

(2) Vagueness of Terms

§ 147. Knowing, license, and other particular terms in criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79

Where the alleged objectionable terms, "knowing," "license," and "privilege," of a statute which makes a person guilty of trespass who, knowing that the person is not licensed or privileged to do so, enters any premises without intent to harm any property are not ambiguous and are clearly defined in law, the statute is not unconstitutionally vague.¹

A statute providing in part that one who enters or remains in any structure without being "authorized, licensed or invited" commits the offense of trespass is not constitutionally vague or overbroad, even though such terms are not expressly defined in the statute, because such terms are of such common understanding and usage that persons of ordinary intelligence are fully able to determine what conduct is proscribed.²

A criminal trespass statute was not unconstitutionally overbroad based on the speculative claim that an "authorized person" who could rescind a defendant's permission to remain on the property was not limited to a person with written authority from the landowner.³

A statute prohibiting the crime of home invasion was not unconstitutionally vague, despite the fact that the statute did not define specifically what kind of entry into another's dwelling place was prohibited, did not define the term "dangerous weapon," and did not specify as to the modicum of actual or threatened force required to constitute a violation; the statute's caption established that only nonconsensual entry was criminal, a fact finder could determine the definition of "dangerous weapon" using an objective standard, and the degree of force was immaterial under the statute.⁴

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Footnotes

- 1 [State v. Steinmann](#), 20 Conn. App. 599, 569 A.2d 557 (1990).
- 2 [Downer v. State](#), 375 So. 2d 840 (Fla. 1979).
- 3 [State v. Allum](#), 2005 MT 150, 327 Mont. 363, 114 P.3d 233 (2005).
As to the requirement of notice or warning, generally, see §§ [148](#) to [151](#).
- 4 [Com. v. Dunn](#), 43 Mass. App. Ct. 58, 680 N.E.2d 1178 (1997).
As to home invasion statutes, generally, see § [165](#).

End of Document

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75 Am. Jur. 2d Trespass § 148

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

2. Requirement of Notice or Warning

§ 148. Requirement of notice or warning under criminal trespass statutes, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  81

Many criminal trespass statutes require that notice or warning be given to a person that his or her presence on the premises is prohibited.¹ For purposes of a criminal trespass statute, one can be on another's property without permission and yet still be without notice that his or her presence there is forbidden.² Thus some form of communication of any restrictions on the use of land to those entering is essential to a successful trespass prosecution under a statute which provides that no person, without privilege to do so, shall knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows he or she is in violation of any such restriction or is reckless in that regard.³

Practice Tip:

A defendant does not have a due process right to be heard on the validity of a trespass notice prior to its issuance.⁴

Footnotes

- 1 [State v. Delgado](#), 19 Conn. App. 245, 562 A.2d 539 (1989); [Woll v. U.S.](#), 570 A.2d 819 (D.C. 1990); [Moore v. State](#), 200 So. 3d 1290 (Fla. 2d DCA 2016); [State v. Harper](#), 303 Ga. 144, 810 S.E.2d 484 (2018); [State v. Dansinger](#), 521 A.2d 685 (Me. 1987); [Com. v. Hood](#), 389 Mass. 581, 452 N.E.2d 188 (1983); [State in Interest of L.E.W.](#), 239 N.J. Super. 65, 570 A.2d 1019 (App. Div. 1990); [State v. Cargill](#), 100 Or. App. 336, 786 P.2d 208 (1990), [aff'd](#), 316 Or. 492, 851 P.2d 1141 (1993); [Munns v. State](#), 412 S.W.3d 95 (Tex. App. Texarkana 2013).
- Notice is an essential element of the offense of criminal trespass, and must be proven by the state beyond a reasonable doubt at trial. [State v. Harper](#), 303 Ga. 144, 810 S.E.2d 484 (2018).
- 2 [Martin v. State](#), 67 S.W.3d 340 (Tex. App. Texarkana 2001), petition for discretionary review refused, (June 26, 2002).
- 3 [State v. McMechan](#), 48 Ohio App. 3d 261, 549 N.E.2d 211, 58 Ed. Law Rep. 266 (12th Dist. Butler County 1988).
- 4 [O'Banion v. Com.](#), 33 Va. App. 47, 531 S.E.2d 599 (2000) (overruled on other grounds by, [Harris v. Com.](#), 274 Va. 409, 650 S.E.2d 89 (2007)).

End of Document

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75 Am. Jur. 2d Trespass § 149

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

2. Requirement of Notice or Warning

§ 149. Manner of giving notice or warning under criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  81

A.L.R. Library

[Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773](#)

The type of notice required and the time allowed for departure of a trespasser who has been requested to leave the premises of another depend upon the facts of each case.¹ Inherent in the criminal trespass statute's notice provision is a requirement that notice be reasonable under the circumstances, as well as sufficiently explicit to apprise the trespasser what property he or she is forbidden to enter.² Notice against trespass may be given in various ways,³ such as by actual communication, posting, or fencing.⁴ Adequate warnings of land or premises use restrictions can be communicated constructively through the use of physical barriers such as barricades, barriers, and locks, which actually limit or bar access.⁵

Observation:

Notice sufficient to satisfy the requirements of a statute setting forth the offense of trespass may be given through the utilization of words other than "no trespass," so long as the property owner's intent to keep others off the property is reasonably conveyed.⁶

Some criminal trespass statutes require personal communication of the notice that the defendant's presence on the premises constitutes a trespass⁷ or of the lawful order to leave the premises,⁸ although a personal communication may be either oral or written,⁹ such as by a sign.¹⁰ A "No Trespassing" sign posted in a location where it may be reasonably seen prohibits any and all unauthorized entry onto the entirety of the premises.¹¹ Without conspicuously posted signs, one cannot impute the essential element of knowledge for any degree of trespass.¹² In order for posted "no trespassing" signs to provide the required notice against entry, there must be evidence that the signs complied with the governing statute and that the property was "posted" within the meaning of the statute.¹³ The notice becomes effective at the point where the notice is actually posted and not at some indeterminate point in front of the notice.¹⁴ However, no trespassing signs on a property supported the conclusion that a reasonable person knew they were excluded from an area near the fence where the defendant stood when shooting at a deer decoy and, thus, a criminal trespass conviction was valid even if the defendant had not crossed behind the sign closest to his position.¹⁵

For purposes of a prosecution for criminal trespass, the inherent nature of a habitation may give notice that entry is forbidden.¹⁶ For example, locks constitute sufficient notice to a trespasser that entry is forbidden.¹⁷ However, a locked door is not notice that entry is forbidden to a person who is provided a key by one with apparent authority to authorize his or her entry into the residence.¹⁸

Under certain circumstances, a court order dealing with domestic violence may be sufficient notice to sustain a criminal trespass conviction.¹⁹ However, a spouse's comment that they do not want to see a spouse again is not a reasonable and express notice as needed to obtain a criminal trespass conviction.²⁰ For purposes of a prosecution for criminal trespass, in order for the terms of a lease to function as notice that a defendant did not have a legal right to be on leased premises, there must be evidence that the defendant knew those terms.²¹

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Footnotes

- 1 [People v. Spencer](#), 131 Ill. App. 2d 551, 268 N.E.2d 192 (1st Dist. 1971).
- 2 [State v. Harper](#), 303 Ga. 144, 810 S.E.2d 484 (2018).
- 3 [State in Interest of L.E.W.](#), 239 N.J. Super. 65, 570 A.2d 1019 (App. Div. 1990).
- 4 [C.B.S. v. State](#), 184 So. 3d 611 (Fla. 1st DCA 2016); [Com. v. Downing](#), 511 Pa. 28, 511 A.2d 792, 33 Ed. Law Rep. 770 (1986).
A fence around the back area of a house, and the house itself, gave sufficient notice that entry into the house was forbidden, as required to support a conviction for criminal trespass of a building. [Jackson v. State](#), 3 S.W.3d 58 (Tex. App. Dallas 1999).
- 5 [State v. McMechan](#), 48 Ohio App. 3d 261, 549 N.E.2d 211, 58 Ed. Law Rep. 266 (12th Dist. Butler County 1988).
- 6 [State v. Gibson](#), 425 N.J. Super. 523, 42 A.3d 208 (App. Div. 2012), judgment rev'd on other grounds, 218 N.J. 277, 95 A.3d 110 (2014).

It ought in every case of criminal trespass, based on entry after notice that entry is forbidden, to be made to clearly appear, not only that the notice not to enter given to the accused was intended to apply to the particular premises alleged to have been unlawfully entered upon, but also that such notice was conveyed to the accused by language sufficiently explicit to enable the accused to so understand. *Harper v. State*, 338 Ga. App. 535, 790 S.E.2d 552 (2016), cert. granted, (May 1, 2017) and rev'd on other grounds, 303 Ga. 144, 810 S.E.2d 484 (2018).

State v. Martone, 160 Conn. App. 315, 125 A.3d 590 (2015); *C.B.S. v. State*, 184 So. 3d 611 (Fla. 1st DCA 2016).

A specific order by an owner to a person to stay away from the owner's property constitutes notice sufficient to make a knowing return by the person to the property a violation of the criminal trespass statute. *State v. Ash*, 12 S.W.3d 800 (Tenn. Crim. App. 1999).

State v. Dansinger, 521 A.2d 685 (Me. 1987); *State v. O'Brien*, 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989); *State in Interest of L.E.W.*, 239 N.J. Super. 65, 570 A.2d 1019 (App. Div. 1990); *City of Seattle v. Rice*, 93 Wash. 2d 728, 612 P.2d 792 (1980); *State v. Horn*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

An order that was served on the defendant and barred him from housing authority property could eliminate the defense that the police never asked the defendant to leave; the order to stay away effectively provided the notice that was at the heart of the defense to a charge of criminal trespass. *State v. Ash*, 12 S.W.3d 800 (Tenn. Crim. App. 1999).

Watson v. State, 63 Ala. 19, 1879 WL 934 (1879); *People v. Quiroga*, 2015 IL App (1st) 122585, 396 Ill. Dec. 716, 40 N.E.3d 369, 323 Ed. Law Rep. 1052 (App. Ct. 1st Dist. 2015); *State in Interest of J.A.V.*, 558 So. 2d 214 (La. 1990); *People v. Leonard*, 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 (1984) ("persona non grata" letter).

Evidence was sufficient to sustain a defendant's conviction for criminal trespass to real property; the defendant entered onto the neighbor's property when the defendant stood on driveway, and although the defendant was repeatedly told to leave and threatened with arrest while standing on the driveway, the defendant nevertheless deliberately threw his empty envelope onto the neighbor's lawn and then ventured further onto the neighbor's property in order to retrieve the empty envelope. *People v. Likar*, 329 Ill. App. 3d 654, 263 Ill. Dec. 390, 768 N.E.2d 150 (1st Dist. 2002).

Artis v. U.S., 554 A.2d 327 (D.C. 1989).

Kim v. Commonwealth, 293 Va. 304, 797 S.E.2d 766 (2017).

People v. Outlar, 177 Misc. 2d 620, 677 N.Y.S.2d 430 (N.Y. City Crim. Ct. 1998).

D.T. v. State, 87 So. 3d 1235 (Fla. 4th DCA 2012).

A "no loitering" sign in the window of a community center did not provide the defendant with notice that entry onto the property would constitute trespass, as a person was loitering if he or she remained in one place with no apparent purpose, while the trespass statute prohibited mere entry onto property without license or privilege to do so. *State v. Gibson*, 218 N.J. 277, 95 A.3d 110 (2014).

Blakney v. State, 819 N.E.2d 542 (Ind. Ct. App. 2004).

A construction site was not legally posted in accordance with a statute prohibiting trespass on a construction site as to support the defendant's conviction where, although the one sign substantially complied with the statute's language, the construction site did not provide a sign at each corner of the lot, as required under statute, and the structure on the property did not constitute a dwelling as to afford property an exception to the posting requirement, as there was no roof on the structure. *Lewis v. State*, 932 So. 2d 357 (Fla. 2d DCA 2006).

State v. Emerson, 675 A.2d 978 (Me. 1996).

Munns v. State, 412 S.W.3d 95 (Tex. App. Texarkana 2013).

State v. Harper, 303 Ga. 144, 810 S.E.2d 484 (2018); *Munns v. State*, 412 S.W.3d 95 (Tex. App. Texarkana 2013).

Munns v. State, 412 S.W.3d 95 (Tex. App. Texarkana 2013).

Jordan v. State, 802 So. 2d 1180 (Fla. 3d DCA 2001); *State v. Mernar*, 345 N.J. Super. 591, 786 A.2d 141 (App. Div. 2001).

Wood v. State, 227 Ga. App. 677, 490 S.E.2d 179 (1997) (disapproved of on other grounds by, *State v. Harper*, 303 Ga. 144, 810 S.E.2d 484 (2018)).

21

[Munns v. State, 412 S.W.3d 95 \(Tex. App. Texarkana 2013\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 150

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

2. Requirement of Notice or Warning

§ 150. Manner of giving notice or warning under criminal trespass statutes—Time of notice or warning

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  81

Under a statute prohibiting a person from entering or remaining in places or on land after being forbidden to do so, only after a reasonably contemporaneous request to leave has been made, such a request is reasonably contemporaneous if given a few hours prior to the arrest, the same day as the arrest, or at such other prearrest interval reasonable under the facts and circumstances of each particular case.¹ Where a prior warning is statutorily required to justify an arrest for trespass, if the arresting officer of a defendant convicted of trespass had substantial reason to believe that a prior warning had been issued in accordance with the statute, it is irrelevant and unnecessary that the officer was not present when the prior warning was issued where the officer was present during the trespass.²

Observation:

A criminal trespass statute may provide for separate offenses where the only substantive difference between the offenses lies in the time of giving the notice; thus, criminal trespass may consist of entering and remaining where notice forbidding entry is given before the accused goes upon premises or may deal with lawful entry and remaining on the premises after the defendant has been directed to leave.³

The fact that public officials do not immediately request a person to leave, even though the person is inside a public building after it has been closed for the day, does not estop them from making a later request that the trespasser leave such building.⁴

Notification to trespassers on public housing property need not be contemporaneous with the act of trespassing.⁵

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Footnotes

- 1 [State in Interest of J.A.V., 558 So. 2d 214 \(La. 1990\).](#)
As to unauthorized entry as criminal trespass, generally, see §§ [164](#), [165](#).
As to unlawfully remaining on premises as criminal trespass, generally, see §§ [166](#), [167](#).
- 2 [State v. Yunker, 402 So. 2d 591 \(Fla. 5th DCA 1981\).](#)
- 3 [Strozier v. State, 187 Ga. App. 16, 369 S.E.2d 504 \(1988\).](#)
- 4 [Parrish v. Municipal Court, Modesto Judicial Dist., Stanislaus County, 258 Cal. App. 2d 497, 65 Cal. Rptr. 862 \(5th Dist. 1968\).](#)
- 5 [Johnson v. State, 356 Md. 498, 740 A.2d 615 \(1999\)](#) (a notification not to trespass on public housing property did not grow stale after two years).

End of Document

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75 Am. Jur. 2d Trespass § 151

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

2. Requirement of Notice or Warning

§ 151. Manner of giving notice or warning under criminal trespass statutes—Who may give notice or warning

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  81

Many criminal trespass statutes require that notice or warning be given to a person that his or her presence on the premises is a trespass, by the owner; rightful occupant; upon proper identification, an authorized representative of the owner or rightful occupant,¹ that is, his or her agent;² or by a person lawfully in charge of the premises.³

A tenant in an apartment complex has no authority to order a person not to enter the common areas of the apartment complex, such as a public lobby.⁴

More than one person can have the authority to order someone to leave either public or private premises; reasonableness is a factor in determining such authority.⁵

Practice Tip:

Only if a defendant at a trial for trespass challenges the authorization of one who posted notice of, or who otherwise communicated, a restriction on the use of public premises is the prosecution required to prove the identity of the individual and his or her authority to restrict access to the portion of the public facility in question; otherwise, it is sufficient if the prosecutor establishes that the defendant was on notice that he or she was not authorized to enter the portion of the public building in which the alleged trespass occurred.⁶

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Footnotes

- 1 [State v. Delgado](#), 19 Conn. App. 245, 562 A.2d 539 (1989) (owner or authorized person); [Sheehan v. State](#), 314 Ga. App. 325, 723 S.E.2d 724 (2012) (disapproved of on other grounds by, [State v. Harper](#), 303 Ga. 144, 810 S.E.2d 484 (2018)) (owner, rightful occupant, or by an authorized representative); [State v. Dansinger](#), 521 A.2d 685 (Me. 1987); [State v. Scholberg](#), 395 N.W.2d 454 (Minn. Ct. App. 1986) (lawful possessor); [State v. O'Brien](#), 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989) (owner or authorized person); [State v. Allum](#), 2005 MT 150, 327 Mont. 363, 114 P.3d 233 (2005) (authorized person).
- 2 [Woll v. U.S.](#), 570 A.2d 819 (D.C. 1990) (police officer); [State v. McCormack](#), 517 So. 2d 73 (Fla. 3d DCA 1987) (police officer).

Under the criminal trespass statute, whether the principal has given the agent express authority to order a third party from the principal's premises depends on a manifestation of consent by the principal; the relevant focus is on the perceptions of the agent, not the third party. [State v. Dyer](#), 2001 ME 62, 769 A.2d 873 (Me. 2001).
- 3 [Hemmati v. U.S.](#), 564 A.2d 739 (D.C. 1989); [State v. Cargill](#), 100 Or. App. 336, 786 P.2d 208 (1990), *aff'd*, 316 Or. 492, 851 P.2d 1141 (1993).

A defendant's conviction for first-degree criminal trespass in connection with an animal rights protest at a circus held on church property was supported by evidence that the pastor who had control and authority over the property personally communicated to the defendant an order to leave the property and not to return and that the pastor authorized police officers to remove the protestors from the property. [State v. Vlasak](#), 52 Conn. App. 310, 726 A.2d 648 (1999).
- 4 [State v. LoSacco](#), 12 Conn. App. 172, 529 A.2d 1348 (1987).
- 5 [Woll v. U.S.](#), 570 A.2d 819 (D.C. 1990).
- 6 [Downer v. State](#), 375 So. 2d 840 (Fla. 1979).

End of Document

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75 Am. Jur. 2d Trespass § 152

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

3. Requirement of Knowledge or Intent

§ 152. Requirement of knowledge under criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  80

Criminal trespass has a scienter requirement;¹ the common requirement of criminal trespass offenses is that the actor be aware of the fact that he or she is making an unwarranted intrusion,² and, in general, criminal trespass statutes require that the trespass be knowingly committed.³

Practice Tip:

For purposes of a statute providing that a person is guilty of criminal trespass if, knowing he or she is not privileged or licensed to do so, the person enters or remains in a dwelling, knowledge is a question of fact and need not be absolute but merely a firm belief unaccompanied by substantial doubt.⁴

In the absence of evidence that the defendant knowingly entered store premises as a trespasser, there can be no trespass unless the possessor revoked the defendant's status as a business invitee.⁵

Observation:

The knowledge requirement of criminal trespass statutes is designed primarily to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he or she has received an express or implied permission to enter or remain.⁶

Where a statute requires that the actor have knowledge that the remaining is unlawful, the assertion by the prosecution that the defendants entered the premises lawfully but remained there unlawfully after being ordered to leave, standing alone, was insufficient where, under the circumstances, it was reasonable for the defendants to conclude that they had a license or privilege to be on the premises and such belief, even if mistaken, negated the element of "knowing unlawful remaining."⁷

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Footnotes

- 1 [Com. v. Johnson](#), 2003 PA Super 65, 818 A.2d 514 (2003).
- 2 [Warfield v. State](#), 315 Md. 474, 554 A.2d 1238 (1989).
As to unauthorized entry as criminal trespass, generally, see §§ 164, 165.
- 3 [State v. Brunette](#), 92 Conn. App. 440, 886 A.2d 427 (2005); [People v. Hsiu Yan Chai](#), 2014 IL App (2d) 121234, 384 Ill. Dec. 494, 16 N.E.3d 887 (App. Ct. 2d Dist. 2014) (applies to all elements of the offense of criminal trespass); [State v. Hill](#), 497 S.W.3d 391 (Mo. Ct. App. E.D. 2016); [State v. Wickliff](#), 378 N.J. Super. 328, 875 A.2d 1009 (App. Div. 2005); [In re Daniel B.](#), 2 A.D.3d 440, 768 N.Y.S.2d 230 (2d Dep't 2003).
Because the criminal trespass statute does not specify a culpable mental state, the State must prove that defendant acted intentionally, knowingly, or recklessly. [Matter of D.L.](#), 541 S.W.3d 917 (Tex. App. Houston 14th Dist. 2018).
A person commits the crime of criminal trespass in the first degree if the person intentionally, knowingly, recklessly or with criminal negligence enters or remains unlawfully in a dwelling. [State v. Lucero](#), 265 Or. App. 328, 335 P.3d 1275 (2014).
- 4 [State v. Bernstein](#), 2005 ND APP 6, 697 N.W.2d 371 (N.D. Ct. App. 2005).
- 5 [State v. Mention](#), 12 Conn. App. 258, 530 A.2d 645 (1987).
- 6 [Lowery v. State](#), 430 Md. 477, 61 A.3d 794 (2013).
- 7 [People v. Ranieri](#), 144 A.D.2d 1006, 534 N.Y.S.2d 287 (4th Dep't 1988) (defendants went to the residence of their daughter and son-in-law to pick up their granddaughter for purposes of exercising court ordered visitation rights).
As to unlawfully remaining on premises as criminal trespass, generally, see §§ 166, 167.

End of Document

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75 Am. Jur. 2d Trespass § 153

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

3. Requirement of Knowledge or Intent

§ 153. Requirement of intent under criminal trespass statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  80

Willful intent is an element of general criminal trespass.¹ Even where a statute is silent as to intent, criminal intent is an essential element of the statutory offense of trespass.² Thus in order to show a criminal trespass, it is necessary that it be shown that there was an intent to do an act which was in violation of the statute, as distinguished from a civil trespass or injury which may be a result of negligence.³ Where a statute criminalizes trespass, a defendant commits no criminal trespass without the criminal intent.⁴

One need not intend the result that occurred to be found guilty of knowingly committing the crime of trespass.⁵

However, it has also been held that to convict a defendant of trespassing, a jury does not need to find that the defendant acted with criminal intent.⁶

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Footnotes

- 1 Lawson v. Com., 35 Va. App. 610, 547 S.E.2d 513 (2001).
- 2 State v. Larason, 75 Ohio L. Abs. 211, 143 N.E.2d 502 (C.P. 1956); Reed v. Com., 6 Va. App. 65, 366 S.E.2d 274 (1988).
- 3 White v. Mississippi Power & Light Co., 196 So. 2d 343, 30 A.L.R.3d 754 (Miss. 1967).
- 4 Reed v. Com., 6 Va. App. 65, 366 S.E.2d 274 (1988).
- 5 State v. Blalock, 232 Mont. 223, 756 P.2d 454 (1988).

6 [State v. Occhino, 572 N.W.2d 316 \(Minn. Ct. App. 1997\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 154

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

3. Requirement of Knowledge or Intent

§ 154. Requirement of intent under criminal trespass statutes—Requirement as to general or specific intent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  80

Unlawful entry, or criminal trespass, does not require the specific intent to commit a particular crime.¹ It is the absence of that very intent which principally distinguishes trespass or unlawful entry from other crimes, such as burglary;² where the state cannot establish intent to commit a particular underlying felony, criminal trespass is the appropriate charge.³

General malice or criminal intent, rather than specific intent, is sufficient to sustain a conviction for trespass.⁴

In some states, the offense of home invasion does not necessitate the showing of an entry with a specific intent to commit a crime; rather, a defendant is guilty of home invasion if the defendant commits a forcible entry of an inhabited dwelling without permission of the owner, resident, or lawful occupant.⁵ In others, the state has to prove beyond a reasonable doubt that a defendant charged with home invasion knowingly and unlawfully entered a dwelling and that the defendant specifically intended to commit a crime in the dwelling.⁶ It might be that to convict a defendant of home invasion, the state must prove beyond a reasonable doubt the defendant had the intent to use force or violence against a person in the home or to vandalize, deface, or damage the property.⁷

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Footnotes

¹ [Williams v. U.S.](#), 549 A.2d 328 (D.C. 1988); [State v. Blalock](#), 232 Mont. 223, 756 P.2d 454 (1988).

2 [Williams v. U.S.](#), 549 A.2d 328 (D.C. 1988).

3 [Freshwater v. State](#), 853 N.E.2d 941 (Ind. 2006).

If a defendant successfully entered a condominium unit not his or her own with an intent to commit an offense, the crime was a completed burglary, but if the defendant successfully entered a condominium unit not his or her own with no such intent, the crime was a trespass. [Pepitone v. State](#), 846 So. 2d 640 (Fla. 2d DCA 2003).

4 [State v. Champa](#), 494 A.2d 102 (R.I. 1985).

The only state of mind of a defendant, charged with unlawful entry onto university premises, that the government had to prove was the defendant's general intent to be on the premises contrary to the will of the lawful owner. [Artisst v. U.S.](#), 554 A.2d 327 (D.C. 1989).

5 [Servin v. State](#), 117 Nev. 775, 32 P.3d 1277 (2001).

As to home invasion, generally, see § 165.

6 [State v. Gemmell](#), 151 Conn. App. 590, 94 A.3d 1253 (2014).

7 [State v. Smith](#), 141 So. 3d 853 (La. Ct. App. 4th Cir. 2014), writ denied, 170 So. 3d 155 (La. 2015).

End of Document

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75 Am. Jur. 2d Trespass § 155

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

3. Requirement of Knowledge or Intent

§ 155. Requirement of intent under criminal trespass statutes—Effect of claim of right, license, or privilege to be on property; mistaken claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  80, 84

Criminal trespass statutes make it unlawful to enter the property of another without a claim of right,¹ license, or privilege.² However, the state, in prosecuting a defendant for criminal trespass to a residence, is not required to prove that the defendant knew that he or she lacked authority to enter the victim's residence.³

Definitions:

The term "privilege" means the freedom or authority to act and to use the property; "licensed" means a consensual entry.⁴

If a defendant has a claim of right to be on certain property, he or she lacks the criminal intent to trespass thereon.⁵ Where one entering a building has permission to enter, there is no trespass.⁶ In general, a person is licensed or privileged to enter private premises, for purposes of criminal trespass, when the person has obtained the consent of the owner or another whose relationship to the premises gives him or her authority to issue such consent.⁷ When a person has received an invitation from

the owner of a property to enter, consistently with the principles of common law trespass, that invitation generally is sufficient to establish that the entrant is licensed or privileged to do so, within the meaning of a criminal trespass statute.⁸ When an entrant charged with trespass claims that he or she is permitted or invited to enter the premises, the state has the burden to prove two elements to establish that the entry is not otherwise licensed or privileged: (1) the person issuing the invitation lacked actual authority to do so, and (2) the entrant knew or believed there was no such authority.⁹

Caution:

With respect to the crime of armed home invasion, the purported consent to entry cannot be considered legally significant unless the occupant has been made aware that the person at the door is armed with a dangerous weapon and is about to commit an assault once inside.¹⁰

A defendant who enters a property with a bona fide, good faith, but mistaken belief that he or she was entitled to be there cannot be convicted of defiant trespass.¹¹ A defendant lacks the requisite criminal intent for unlawful entry when a person enters a place with a good purpose and a bona fide belief in his or her right to enter.¹² Even a mistaken belief of the right to enter precludes a finding of unlawful entry under a criminal trespass statute.¹³ If a person has a fair and reasonable foundation for believing he or she has a right to be present on the property, there is no criminal trespass.¹⁴ In other words, a statute creating the offense of criminal trespass does not criminalize acts that are undertaken in good faith as a proper exercise of ownership under a claimed right because there is no criminal intent in that case.¹⁵

For purposes of determining whether a defendant's approach of a home can support a conviction for criminal trespass, the scope of a homeowner's implied consent to approach the home is limited to those acts reasonably undertaken to contact the residents of the home, as such consent does not extend, for instance, to an exploratory search of the curtilage.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

When a person is licensed, invited, or otherwise privileged to enter the premises of another, he or she cannot be convicted of criminal trespass. [Mont. Code Ann. §§ 45-6-201\(1\), 45-6-203](#). [City of Bozeman v. Lehrer, 2020 MT 55, 399 Mont. 166, 459 P.3d 850 \(2020\)](#).

[END OF SUPPLEMENT]

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Footnotes

¹ [State v. Scholberg, 395 N.W.2d 454 \(Minn. Ct. App. 1986\)](#).

- 2 State v. Delgado, 19 Conn. App. 245, 562 A.2d 539 (1989); State v. Dansinger, 521 A.2d 685 (Me. 1987);
State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989).
A person who knows that he or she is not licensed or privileged to enter a place as to which notice against
trespass is given by actual communication, posting, or fencing is guilty of trespass. State v. McCormack, 517
So. 2d 73 (Fla. 3d DCA 1987); Com. v. Downing, 511 Pa. 28, 511 A.2d 792, 33 Ed. Law Rep. 770 (1986).
- 3 People v. Davis, 2012 IL App (2d) 100934, 360 Ill. Dec. 189, 968 N.E.2d 682 (App. Ct. 2d Dist. 2012).
- 4 State v. Bernstein, 2005 ND APP 6, 697 N.W.2d 371 (N.D. Ct. App. 2005).
- 5 State v. Scholberg, 395 N.W.2d 454 (Minn. Ct. App. 1986).
- 6 Eltaher v. State, 777 So. 2d 1203 (Fla. 4th DCA 2001).
- 7 In re Lonique M., 93 A.D.3d 203, 939 N.Y.S.2d 341 (1st Dep't 2012).
A license from the owner to access the premises, within the meaning of the statutory affirmative defense
against prosecution for criminal trespass, is satisfied by showing a license from any owner or other person
authorized to license access to the premises. State v. McCave, 282 Neb. 500, 805 N.W.2d 290 (2011).
- 8 State v. Klein, 267 Or. App. 348, 342 P.3d 89 (2014).
- 9 State v. Schneider, 246 Or. App. 163, 265 P.3d 36 (2011).
- 10 United States v. Barbosa, 896 F.3d 60 (1st Cir. 2018) (applying Massachusetts law).
- 11 Commonwealth v. Wanner, 2017 PA Super 81, 158 A.3d 714 (2017).
An individual who enters upon the premises accidentally, or who honestly believes that he or she is licensed
or privileged to enter, is not guilty of any degree of criminal trespass. People v. Luke, 37 Misc. 3d 73, 955
N.Y.S.2d 465 (App. Term 2012).
- 12 Ortberg v. U.S., 81 A.3d 303 (D.C. 2013).
- 13 People v. Powell, 180 Misc. 2d 627, 691 N.Y.S.2d 263 (Sup 1999).
- 14 Blair v. State, 62 N.E.3d 424 (Ind. Ct. App. 2016).
- 15 Gornick v. State, 947 S.W.2d 678 (Tex. App. Texarkana 1997).
- 16 State v. Welsh, 267 Or. App. 8, 340 P.3d 132 (2014).

End of Document

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75 Am. Jur. 2d Trespass § 156

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

4. Defense of Necessity or Justification

a. In General

§ 156. Defense of necessity or justification under criminal trespass statutes, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  84

A.L.R. Library

[Trespass: state prosecution for unauthorized entry, or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773](#)

[Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551](#)

[Validity, construction, and application of Freedom of Access to Clinic Entrances Act \(FACE\) \(18 U.S.C.A. sec. 248\), 134 A.L.R. Fed. 507](#)

In an appropriate factual situation, the common law defense of necessity may be interposed to a criminal trespass action.¹ However, the defense does not arise from the choice of several courses of action; it is based on a real emergency and can only be asserted by a defendant who is confronted with such a crisis as a personal danger, a crisis which did not permit a selection from among several solutions, some of which involve criminal acts.² If there is a reasonable, legal alternative to committing the trespass, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense of necessity is not available.³

Practice Tip:

Counsel may wish to use a motion in limine to gain an early ruling on the use of the defenses of necessity, justification, or competing harms in a prosecution based on an unauthorized entry onto business, industrial, or utility premises.⁴ However, although a trial judge may properly rule, at a pretrial hearing on motions in limine, that the competing harms defense is unavailable because there is no evidence to warrant a reasonable doubt whether the trespass was justified by necessity, such a ruling may prevent even the introduction of evidence in support of the defense, and it is deemed more prudent for the judge to follow the traditional and constitutionally sounder course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense.⁵

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Footnotes

- 1 [People v. Hubbard](#), 115 Mich. App. 73, 320 N.W.2d 294 (1982).
- 2 [State v. Champa](#), 494 A.2d 102 (R.I. 1985).
The necessity defense applies only where an emergency produces the necessity. [Cleveland v. Municipality of Anchorage](#), 631 P.2d 1073 (Alaska 1981).
- 3 [Buckley v. City of Falls Church](#), 7 Va. App. 32, 371 S.E.2d 827 (1988).
- 4 [Com. v. Hood](#), 389 Mass. 581, 452 N.E.2d 188 (1983); [City of St. Louis v. Klocker](#), 637 S.W.2d 174 (Mo. Ct. App. E.D. 1982).
- 5 [Com. v. Hood](#), 389 Mass. 581, 452 N.E.2d 188 (1983).

End of Document

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75 Am. Jur. 2d Trespass § 157

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

4. Defense of Necessity or Justification

a. In General

§ 157. Elements of necessity defense to criminal trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  84

In a case of criminal trespass, in order for the defense of necessity to apply, the defendants must have no other legal or lawful alternative.¹ The harm threatened must be imminent;² the act charged must have been done to prevent a clear and readily apparent³ significant harm.⁴ The actions of the alleged trespassers must be reasonably designed to actually prevent the threatened harm⁵ or provide a reasonable expectation of success in avoiding the harm,⁶ such that a direct causal relationship may be reasonably anticipated to exist between the defendant's action and the avoidance of the harm,⁷ and the harm caused must not have been disproportionate to the harm caused by the trespass.⁸

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Footnotes

- ¹ [Northeast Women's Center, Inc. v. McMonagle](#), 868 F.2d 1342 (3d Cir. 1989) (abortion protest); [State v. Drummy](#), 18 Conn. App. 303, 557 A.2d 574 (1989) (recognizing rule); [Com. v. Magadini](#), 474 Mass. 593, 52 N.E.3d 1041 (2016); [State v. O'Brien](#), 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989) (abortion protest); [Buckley v. City of Falls Church](#), 7 Va. App. 32, 371 S.E.2d 827 (1988).
- ² [Northeast Women's Center, Inc. v. McMonagle](#), 868 F.2d 1342 (3d Cir. 1989) (abortion protest); [Pursley v. State](#), 21 Ark. App. 107, 730 S.W.2d 250 (1987); [State v. Drummy](#), 18 Conn. App. 303, 557 A.2d 574 (1989) (recognizing rule); [State v. Dansinger](#), 521 A.2d 685 (Me. 1987) (nuclear weapons protest); [Com. v. Magadini](#), 474 Mass. 593, 52 N.E.3d 1041 (2016) (clear and imminent danger); [State v. O'Brien](#), 784

S.W.2d 187 (Mo. Ct. App. E.D. 1989) (abortion protest); *Buckley v. City of Falls Church*, 7 Va. App. 32, 371 S.E.2d 827 (1988).

3 Com. v. Wall, 372 Pa. Super. 534, 539 A.2d 1325 (1988) (abortion protest).

4 State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989) (abortion protest).

5 *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981) (by implication); *Sigma Reproductive Health Center v. State*, 297 Md. 660, 467 A.2d 483 (1983) (recognizing rule); *Com. v. Wall*, 372 Pa. Super. 534, 539 A.2d 1325 (1988) (abortion protest).

The necessity defense was unavailable to a defendant, charged with the violation of unlawful trespass, who interfered with the testing of Gatling guns on the belief that such action would delay the shipment of guns or replacement gun barrels to El Salvador; no reasonable juror could conclude that the defendant reasonably believed his actions would have a causal effect in preventing the killing of civilians in El Salvador, especially because the defendant did not even know whether the guns being tested that day were destined for El Salvador. *State v. Cram*, 157 Vt. 466, 600 A.2d 733 (1991).

6 *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (abortion protest); *State v. Dansinger*, 521 A.2d 685 (Me. 1987) (nuclear weapons protest); *State v. Diener*, 706 S.W.2d 582 (Mo. Ct. App. E.D. 1986) (nuclear weapons protest).

7 *State v. Drummy*, 18 Conn. App. 303, 557 A.2d 574 (1989) (recognizing rule); *State v. Champa*, 494 A.2d 102 (R.I. 1985); *Buckley v. City of Falls Church*, 7 Va. App. 32, 371 S.E.2d 827 (1988).

8 *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo. Ct. App. E.D. 1982) (abortion protest); *Erlandson v. State*, 763 S.W.2d 845 (Tex. App. Houston 14th Dist. 1988), petition for discretionary review refused, (Apr. 26, 1989) (abortion protest).

End of Document

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75 Am. Jur. 2d Trespass § 158

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

4. Defense of Necessity or Justification

a. In General

§ 158. Choice of evils and competing harms defense to criminal trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  84

The defense of necessity traditionally addresses the dilemma created when physical forces beyond the actor's control render illegal conduct the lesser of two evils.¹ Conduct which the actor believes to be necessary to avoid imminent physical harm to him- or herself, or another, that is, the necessity of choosing trespass as the lesser of two evils or two competing harms, is justifiable if the desirability and urgency of avoiding such harm outweigh, according to an understanding of reasonableness, the harm sought to be prevented by the statute defining the crime charged.² Conduct which would otherwise be a crime is, under unusual and imminent circumstances, the lesser of two evils and no offense; when the pressure of circumstances presents one with a choice of evils, the law prefers that a person avoid the greater evil by bringing about the lesser evil.³

The "competing harms" defense exonerates one who commits a crime under the pressure of circumstances if the harm that would have resulted from compliance with the law exceeds the harm actually resulting from the defendants' violation of the law.⁴ The competing harms defense does not exonerate the defendants charged with trespassing where the defendants had legal alternatives, where there was no imminent harm, and, most importantly, where no reasonable person could find there was a direct causal relationship between the defendants' actions in the avoidance of the alleged harm because, under any possible set of hypotheses, the defendants could foresee that their actions would fail to halt the corporation's production of the war material.⁵

Observation:

Where a statute proscribes the conduct allegedly constituting the trespass in terms of strict or absolute liability, such as trespassing on a nuclear power plant construction site, the defense of justification is not available.⁶

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Footnotes

- 1 [Buckley v. City of Falls Church, 7 Va. App. 32, 371 S.E.2d 827 \(1988\).](#)
- 2 [State v. Dansinger, 521 A.2d 685 \(Me. 1987\).](#)
- 3 [State v. Drummy, 18 Conn. App. 303, 557 A.2d 574 \(1989\); State v. O'Brien, 784 S.W.2d 187 \(Mo. Ct. App. E.D. 1989\).](#)
- 4 [State v. Dansinger, 521 A.2d 685 \(Me. 1987\) \(by implication\); Com. v. Hood, 389 Mass. 581, 452 N.E.2d 188 \(1983\).](#)
- 5 [State v. Marley, 54 Haw. 450, 509 P.2d 1095 \(1973\) \(trespass allegedly to protest a corporation's role in manufacturing weapons\).](#)
- 6 [State v. Hunt, 630 S.W.2d 211 \(Mo. Ct. App. W.D. 1982\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 159

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

4. Defense of Necessity or Justification

b. Harms Encompassed

§ 159. Harms encompassed under necessity defense, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  84

The defense of necessity deals with obvious and generally recognized harms, not with those which are debatable and the subject of legislation or government regulation.¹ The defense is meant to justify action that society would clearly want to exonerate, and thus, when a court applies the necessity test, the balancing of the harms reflects society's consensus.² Where the alleged harm is not a legally recognizable injury, the defense is not applicable.³

Although the defense of necessity traditionally addresses the dilemma created when physical forces beyond the actor's control render a trespass the lesser of two evils, the requirement that the harm sought to be avoided by necessity arise either from physical forces of nature or from unlawful human acts has been relaxed such that the defense of necessity may encompass harm caused by human beings, if such expansion is limited to those human threats which are illegal.⁴

Where a statutory defense of necessity is available only where the accused was without blame in occasioning or developing a situation and reasonably believed the conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from the trespass, the doctrine of necessity is not available in defense to a trespass for protest that interferes with constitutional rights.⁵

Observation:

It has been suggested in the context of criminal trespass that where the prevented harm emanates from a human source, the harm must be unlawful and that the defense of necessity is not available if the human act is legal; however, the courts have not fully articulated the availability of the defense in the dichotomy of the legal-illegal distinction, inasmuch as legality is not the only test, and, thus, it may be that in certain limited situations, the defense may be available when the human activity is legal.⁶

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Footnotes

- 1 [State v. Drummy](#), 18 Conn. App. 303, 557 A.2d 574 (1989); [Com. v. Hood](#), 389 Mass. 581, 452 N.E.2d 188 (1983) (nuclear weapons protest); [Erlandson v. State](#), 763 S.W.2d 845 (Tex. App. Houston 14th Dist. 1988), petition for discretionary review refused, (Apr. 26, 1989) (by implication; abortion protest).
- 2 [People v. Smith](#), 161 Ill. App. 3d 213, 112 Ill. Dec. 745, 514 N.E.2d 211 (3d Dist. 1987).
- 3 [Cleveland v. Municipality of Anchorage](#), 631 P.2d 1073 (Alaska 1981) (by implication); [Sigma Reproductive Health Center v. State](#), 297 Md. 660, 467 A.2d 483 (1983) (recognizing rule); [Com. v. Averill](#), 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981) (by implication).
- 4 [Bird v. Municipality of Anchorage](#), 787 P.2d 119 (Alaska Ct. App. 1990) (abortion protest); [State v. O'Brien](#), 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989) (abortion protest).
- 5 [People v. Smith](#), 161 Ill. App. 3d 213, 112 Ill. Dec. 745, 514 N.E.2d 211 (3d Dist. 1987) (abortion protest); [State v. Cozzens](#), 241 Neb. 565, 490 N.W.2d 184 (1992) (abortion protest).
- 6 [State v. O'Brien](#), 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989).

End of Document

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75 Am. Jur. 2d Trespass § 160

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

4. Defense of Necessity or Justification

b. Harms Encompassed

§ 160. Defense of necessity as to protest of political or moral issue

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  84

The defense of necessity is not a valid defense for criminal trespass charges which stem from political or moral protest, in view of the availability of alternative, noncriminal means of accomplishing a protestor's purpose.¹ Thus the defense is unavailable against a charge of criminal trespass based on a protest where there has been exhaustive legislative debate and legislation on the issue which the defendants protested by means of trespass.²

Observation:

Illegal conduct designed to influence policies as a means of accomplishing political change cannot be considered necessary where lawful avenues such as the ballot box or, where appropriate, court action are available.³

Trespasses that interfere with constitutional rights are not justified as actions that society would clearly want to exonerate.⁴ For example, where abortions are a legal, constitutionally protected activity, their occurrence cannot be a legally recognizable

public or private injury;⁵ thus the necessity defense is not available to those who break the law in an effort to prevent abortions.⁶ Similarly, abortion protestors are not entitled to assert statutory justification or a defense of choice of evils in a prosecution for criminal trespass; the defense of choice of evils is unavailable in a prosecution for an offense, based on conduct as an expression of a defendant's moral belief or judgment.⁷

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Footnotes

- 1 [Buckley v. City of Falls Church](#), 7 Va. App. 32, 371 S.E.2d 827 (1988).
- 2 [People v. Hubbard](#), 115 Mich. App. 73, 320 N.W.2d 294 (1982) (nuclear power protest); [Com. v. Wall](#), 372 Pa. Super. 534, 539 A.2d 1325 (1988) (abortion protest).
- 3 [In re Weller](#), 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1st Dist. 1985).
- 4 [People v. Smith](#), 161 Ill. App. 3d 213, 112 Ill. Dec. 745, 514 N.E.2d 211 (3d Dist. 1987) (abortion protest).
- 5 [State v. O'Brien](#), 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989).
- 6 [Cleveland v. Municipality of Anchorage](#), 631 P.2d 1073 (Alaska 1981); [Bird v. Municipality of Anchorage](#), 787 P.2d 119 (Alaska Ct. App. 1990); [People v. Smith](#), 237 Ill. App. 3d 901, 178 Ill. Dec. 666, 605 N.E.2d 105 (3d Dist. 1992).
In view of legislative action that no interference with a woman's choice to have an abortion is to be tolerated, the defense of choice of evils was not available to a defendant in the criminal trespass action for blocking entry to women to an abortion clinic. [State v. Clowes](#), 100 Or. App. 266, 785 P.2d 1071 (1990), decision aff'd, 310 Or. 686, 801 P.2d 789 (1990).
- 7 [State v. Cozzens](#), 241 Neb. 565, 490 N.W.2d 184 (1992).

End of Document

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75 Am. Jur. 2d Trespass § 161

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

a. In General

§ 161. Conduct prohibited under criminal trespass statutes, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

Certain acts of trespass are punishable as crimes particularly when the act is accompanied by willfulness, force, or malice.¹ Furthermore, statutes may distinguish between trespass generally and trespass in a particular place, such as trespass in a parking lot.² Statutes also may distinguish between forcible trespass and trespass after being forbidden to do so.³

In one jurisdiction, the offense of criminal trespass applies only to real property.⁴

Observation:

Not every trespass which is the subject of a civil action is an indictable offense.⁵

CUMULATIVE SUPPLEMENT

Cases:

It is impossible to commit burglary in the third degree without concomitantly committing the violation of trespass. [N.Y. Penal Law §§ 140.05, 140.20](#). [People v. Magnuson](#), 177 A.D.3d 1089, 113 N.Y.S.3d 383 (3d Dep't 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Saint-Fort v. State](#), 222 So. 3d 624 (Fla. 4th DCA 2017), review denied, 2017 WL 4160981 (Fla. 2017) (trespass while armed with a dangerous weapon); [People v. Calandrillo](#), 134 A.D.2d 271, 520 N.Y.S.2d 604 (2d Dep't 1987) (trespass in possession of deadly weapon); [State v. McAlister](#), 59 N.C. App. 58, 295 S.E.2d 501 (1982) (forcible trespass).
- 2 [Fardig v. Municipality of Anchorage](#), 785 P.2d 911 (Alaska Ct. App. 1990), on reh'g, 803 P.2d 879 (Alaska Ct. App. 1990).
- 3 [State v. McAlister](#), 59 N.C. App. 58, 295 S.E.2d 501 (1982).
- 4 [Sarsfield v. State](#), 11 S.W.3d 326 (Tex. App. Houston 14th Dist. 1999), petition for discretionary review refused, (June 21, 2000).
- 5 [Bouie v. City of Columbia](#), 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); [White v. Mississippi Power & Light Co.](#), 196 So. 2d 343, 30 A.L.R.3d 754 (Miss. 1967).

End of Document

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75 Am. Jur. 2d Trespass § 162

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

a. In General

§ 162. Breach of peace as criminal trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

A mere trespass to real property is not a crime at common law unless it amounts to a breach of the peace.¹

Observation:

The law of criminal trespass is a field quite distinct and separate from civil trespass, and unless a trespass is committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law but is to be redressed by a civil action only.²

Every trespass which is a disturbance of the peace is indictable.³

To constitute the offense of criminal trespass, intentional acts, a willful demonstration of force calculated to intimidate or alarm, or acts involving or tending to a breach of the peace must be used.⁴ For instance, statutes sometimes provide that a person

commits a trespass who, having departed from the land or premises of another, after warning, remains about in the vicinity, using profane or indecent language.⁵

A trespass committed with threats of force, or by a show of strength of a multitude of people, constitutes forcible trespass as defined by a statute.⁶ Even though an entry on premises is effected peaceably, if thereafter violent and abusive language is used and acts done reasonably calculated to intimidate or lead to a breach of the peace, the entrant is guilty of forcible trespass.⁷

A criminal trespass statute which makes it an offense to unlawfully enter upon the premises of another with force amounting to a breach of the peace, or such as is calculated to produce a breach of the peace, is not broad enough to encompass property which is owned and operated by a governmental entity and is open to the public.⁸

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Footnotes

- 1 [In re Appeal No. 631 \(77\) From Dist. Court of Montgomery County, Juvenile Division, 282 Md. 223, 383 A.2d 684 \(1978\).](#)
- 2 [Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 \(1964\).](#)
- 3 [White v. Mississippi Power & Light Co., 196 So. 2d 343, 30 A.L.R.3d 754 \(Miss. 1967\).](#)
- 4 [White v. Mississippi Power & Light Co., 196 So. 2d 343, 30 A.L.R.3d 754 \(Miss. 1967\).](#)
- 5 [Corn v. State, 332 So. 2d 4 \(Fla. 1976\).](#)
As to unlawfully remaining on premises as criminal trespass, generally, see §§ 166, 167.
- 6 [State v. McAlister, 59 N.C. App. 58, 295 S.E.2d 501 \(1982\).](#)
- 7 [State v. Tyndall, 192 N.C. 559, 135 S.E. 451, 49 A.L.R. 596 \(1926\).](#)
In a prosecution for trespass with a firearm and for battery, the instantaneousness of the transaction coupled with the consistent aggressive and assaultive conduct of the defendant firmly established an inference of nonconsensual entry, even though the defendant testified that he was invited onto the premises. [Firestone v. State, 407 So. 2d 1070 \(Fla. 4th DCA 1981\).](#)
- 8 [State v. Brooks, 741 S.W.2d 920, 43 Ed. Law Rep. 1212 \(Tenn. Crim. App. 1987\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 163

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

b. Unauthorized Entry

§ 163. Unauthorized entry onto land of another as criminal trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

A.L.R. Library

[Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805](#)

"Criminal trespass" generally requires an unauthorized or unlawful entry.¹ To prove criminal trespass, the state need not allege or prove that a person has been lawfully denied entry onto the property of another, as the lawfulness of the denial is not an element of the offense.²

Observation:

Where a defendant is charged with trespassing after his or her entry was forbidden, refusal to leave is not a necessary element, and the defendant's argument that in order to support a conviction for trespass, the prosecutor was required to prove that the defendant was given an opportunity to leave the premises but refused, was without merit.³

Where permission to enter is obtained under false pretenses, a license is granted for the false purpose while entry is made for another, and the entry therefore exceeds the scope of the limited license and is unlawful, thereby subjecting the purported licensee to criminal liability for trespass.⁴

An order of protection, which typically requires a person to stay away from a victim's home or place of employment and to refrain from any contact, can be used to establish a knowing and unlawful entry since going to a protected person's home, even by invitation or permission, contravenes the terms of the order of protection.⁵ However, a person does not have to violate a temporary protection order in order to commit home invasion, as instead, a person must forcibly enter an inhabited dwelling without permission.⁶

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Footnotes

- 1 [Williams v. City of Chicago](#), 733 F.3d 749 (7th Cir. 2013); [Ortberg v. U.S.](#), 81 A.3d 303 (D.C. 2013); [Daniel v. State](#), 301 Ga. 783, 804 S.E.2d 61 (2017); [People v. Dorsey](#), 408 Ill. Dec. 909, 66 N.E.3d 914 (App. Ct. 4th Dist. 2016), appeal denied, 412 Ill. Dec. 915, 77 N.E.3d 83 (Ill. 2017) (home invasion); [State v. Richie](#), 376 S.W.3d 58 (Mo. Ct. App. E.D. 2012).
The definition of the phrase "enter or remain unlawfully" defined under the criminal trespass statute as entering or remaining "in or upon premises when the premises, at the time of such entry or remaining, are not open to the public or when the entrant is not otherwise licensed or privileged to do so," is intended to ground the crime of criminal trespass in traditional property law. [State v. Klein](#), 267 Or. App. 348, 342 P.3d 89 (2014).
- 2 [Frink v. State](#), 52 N.E.3d 842 (Ind. Ct. App. 2016).
- 3 [People v. Bell](#), 182 Mich. App. 181, 451 N.W.2d 542 (1989).
- 4 [State v. Zembreski](#), 445 N.J. Super. 412, 138 A.3d 583 (App. Div. 2016).
- 5 [People v. Cajigas](#), 19 N.Y.3d 697, 955 N.Y.S.2d 296, 979 N.E.2d 240 (2012).
- 6 [Truesdell v. State](#), 129 Nev. 194, 304 P.3d 396, 129 Nev. Adv. Op. No. 20 (2013).

End of Document

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75 Am. Jur. 2d Trespass § 164

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

b. Unauthorized Entry

§ 164. Unauthorized entry of structure or building as criminal trespass; dwelling place

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

A person commits the crime of trespass if the person knowingly and unlawfully enters the building or structure of another.¹ For the purposes of a statute prohibiting trespass in an occupied structure, a structure is "occupied" if the owners or innocent victims happen to be occupying the conveyance when the offender trespasses; occupation only by those involved in the trespass does not trigger the statute.²

Observation:

Where a statute criminalizes the unlicensed entry of structures, and another statute expressly defines what is a "structure," the type of premises entered is critical because unless such a "structure" is involved, there can be no offense of criminal trespass.³

The term "dwelling," as used in a criminal trespass statute, is any structure where individuals reside and sleep, including, but not limited to, a home, townhouse, apartment, condominium, motel, hotel, or other structure that is dedicated to or intended

for residential use, and a structure may retain its status as a dwelling whether occupied, unoccupied, or vacant, as long as it is suitable for residential use.⁴ A "building," for purposes of a criminal trespass statute is a constructed edifice designed for occupancy.⁵ A garage is a "building" under such a statute,⁶ but fenced-in areas are not.⁷ Additionally, a parking lot is not a "structure" within the meaning of a statute which prohibits the unlicensed entry of a structure.⁸ A trespass statute expressly applying to "any private residence, house, or building of another," applies to a shopping mall, notwithstanding its quasi-public nature, because the commercial mall is a privately owned building to which the public has been invited to come, to look, and to buy, and the invitation presupposes that the conduct of persons coming there will be in keeping with such purposes, not in behavior which could be a financial detriment to all of the store owners in the mall, inasmuch as the statute in question was passed to assist the property owner in the protection of his or her property.⁹

A spouse may be criminally liable for trespass and/or burglary in the dwelling of the other spouse who is exercising custody or control over that dwelling.¹⁰

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Footnotes

- 1 [State v. Martone](#), 160 Conn. App. 315, 125 A.3d 590 (2015) (building or any other premises); [State v. O'Brien](#), 784 S.W.2d 187 (Mo. Ct. App. E.D. 1989); [State v. Braxton](#), 330 N.J. Super. 561, 750 A.2d 185 (App. Div. 2000) (structure); [Matter of Paul N.](#), 244 A.D.2d 489, 664 N.Y.S.2d 341 (2d Dep't 1997) (building or dwelling); [In re J.M.R.](#), 149 S.W.3d 289 (Tex. App. Austin 2004) (property, building, or aircraft).
The crime of criminal trespass is committed when a person enters a building or occupied structure knowing that he or she is not licensed to do so. [Com. v. Thomas](#), 522 Pa. 256, 561 A.2d 699 (1989).
- 2 [D.E. v. State](#), 725 So. 2d 1269 (Fla. 4th DCA 1999).
- 3 [State in Interest of L.E.W.](#), 239 N.J. Super. 65, 570 A.2d 1019 (App. Div. 1990).
- 4 [State v. Scott](#), 169 N.J. 94, 776 A.2d 810 (2001).
- 5 [State v. Joseph](#), 195 Wash. App. 737, 381 P.3d 187 (Div. 3 2016), review granted, 187 Wash. 2d 1009, 388 P.3d 497 (2017) and [aff'd](#), 189 Wash. 2d 645, 405 P.3d 993 (2017).
- 6 [People v. Hanna](#), 981 P.2d 627 (Colo. App. 1998) (attached garage); [People v. Schmid](#), 124 A.D.2d 896, 508 N.Y.S.2d 314 (3d Dep't 1986).
- 7 [State v. Brown](#), 50 Wash. App. 873, 751 P.2d 331 (Div. 1 1988) (abrogated on other grounds by, [In re Heidari](#), 174 Wash. 2d 288, 274 P.3d 366 (2012)).
- 8 [L.K.B. v. State](#), 677 So. 2d 925 (Fla. 5th DCA 1996); [State in Interest of L.E.W.](#), 239 N.J. Super. 65, 570 A.2d 1019 (App. Div. 1990).
- 9 [Corn v. State](#), 332 So. 2d 4 (Fla. 1976).
- 10 [State v. Lilly](#), 87 Ohio St. 3d 97, 1999-Ohio-251, 717 N.E.2d 322 (1999).

End of Document

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75 Am. Jur. 2d Trespass § 165

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

b. Unauthorized Entry

§ 165. Home invasion offenses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

The gravamen of a home invasion offense is unauthorized entry.¹ Elements of a home invasion include (1) an unauthorized entry into a dwelling of another where the defendant knows or has reason to know that one or more persons is present, and (2) a defendant intentionally causes injury or, while armed with a dangerous weapon, a defendant uses or threatens force upon any persons within the dwelling.² The relevant inquiry, with respect to the unauthorized-entry element of home invasion, is not whether the defendant could generally enter the victim's residence, but whether the particular entry at issue was authorized.³ In the home invasion context, the fact that a person previously had permission to enter a house does not imply that the person continues to have such authorization.⁴ The gist of the entry element of an armed home invasion statute is to make an entry unlawful if the armed person has no right to enter the dwelling, possesses the requisite knowledge of the presence of one or more persons inside, and commits an assault or intentionally causes injury.⁵ However, the crime of armed home invasion is not intended to encompass situations where an invited guest in a home suddenly turns violent.⁶ Further, for purposes of a conviction of home invasion, there is no breaking if the defendant had the right to enter the building.⁷

A home invasion statute requiring that the offender intentionally cause injury to any person or persons within the dwelling place does not require that the injury occur within the dwelling if the defendant, in invading the dwelling place, flushes the resident out and causes injury in an immediate sequence within the area of the dwelling,⁸ nor does it require a showing of the use or threat of force after entry is gained because the complete offense of home invasion comprises conduct both inside and outside of the dwelling.⁹ Furthermore, the mere fact that one has not locked or even closed the outside door to one's residence in the middle of a summer day does not constitute an invitation to a perfect stranger to commit a home invasion.¹⁰

To prove that the defendant was guilty of armed home invasion, the state's burden is to prove beyond a reasonable doubt that the defendant was armed with a dangerous weapon at the time of entry.¹¹ A weapon is "dangerous" per se, as a statutory element of armed home invasion, if it is an instrumentality designed and constructed to produce death or great bodily harm and for the purpose of bodily assault or defense, and weapons of this type include firearms, daggers, stilettos and brass knuckles, but not pocket knives, razors, hammers, wrenches and cutting tools.¹² For purposes of satisfying the deadly weapon element of a home invasion statute, if the weapon is a firearm, the state must prove that it is operable, meaning that it is capable of firing a shot.¹³

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Footnotes

- 1 [People v. Taylor](#), 318 Ill. App. 3d 464, 252 Ill. Dec. 107, 742 N.E.2d 357 (1st Dist. 2000).
- 2 [People v. Hicks](#), 181 Ill. 2d 541, 230 Ill. Dec. 244, 693 N.E.2d 373 (1998).
Proof of psychological injury or trauma satisfies the injury element of the section of the home invasion statute that applies when a defendant intentionally causes "any injury." [People v. Hudson](#), 228 Ill. 2d 181, 319 Ill. Dec. 840, 886 N.E.2d 964 (2008).
- 3 [State v. Ellis](#), 109 So. 3d 944 (La. Ct. App. 4th Cir. 2013).
- 4 [State v. Ellis](#), 109 So. 3d 944 (La. Ct. App. 4th Cir. 2013).
For purposes of a conviction of home invasion, the fact that a person is in a dating relationship in no way entitles that person to be present in his or her partner's dwelling at will. [People v. Dunigan](#), 299 Mich. App. 579, 831 N.W.2d 243 (2013).
- 5 [Com. v. Mahar](#), 430 Mass. 643, 722 N.E.2d 461 (2000).
- 6 [Com. v. Mahar](#), 430 Mass. 643, 722 N.E.2d 461 (2000).
- 7 [People v. Dunigan](#), 299 Mich. App. 579, 831 N.W.2d 243 (2013).
- 8 [People v. Kolls](#), 179 Ill. App. 3d 652, 128 Ill. Dec. 491, 534 N.E.2d 673 (2d Dist. 1989).
- 9 [People v. Troutt](#), 172 Ill. App. 3d 668, 122 Ill. Dec. 517, 526 N.E.2d 910 (5th Dist. 1988).
- 10 [People v. Simpson](#), 178 Ill. App. 3d 1091, 128 Ill. Dec. 197, 534 N.E.2d 217 (3d Dist. 1989).
- 11 [Commonwealth v. Buth](#), 480 Mass. 113, 101 N.E.3d 925 (2018).
- 12 [Com. v. Bois](#), 476 Mass. 15, 62 N.E.3d 513 (2016).
- 13 [State v. Edwards](#), 325 Conn. 97, 156 A.3d 506 (2017).

End of Document

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75 Am. Jur. 2d Trespass § 166

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

c. Unlawful Remaining

§ 166. Unlawfully remaining on property of another as criminal trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

Remaining on the property or premises of another unlawfully or without authority is a criminal trespass,¹ particularly after the defendant has been told to leave.² Unlawful remaining requires that the actor have knowledge that remaining is unlawful.³ No culpable mental state is required for a conviction under a criminal trespass statute other than a volitional refusal to leave when requested.⁴ If a person is not given a reasonable period of time to comply with a request to leave, then there is no trespass.⁵

When a person has lawfully entered a building or has lawfully entered upon property, that person does not "remain unlawfully" within the meaning of the trespass statute merely because the person engages in activities that the person knows are forbidden by the property owner.⁶

A police officer who is neither an owner of a property nor an agent of an owner of a property cannot create a trespass violation by asking a patron to leave and then arrest the patron when he or she refuses to do so.⁷ Where a criminal trespass charge is based on communication by the property owner's agent, the state must prove all of the elements necessary to show an agency relationship.⁸

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Footnotes

- 1 State v. Delgado, 19 Conn. App. 245, 562 A.2d 539 (1989); Woll v. U.S., 570 A.2d 819 (D.C. 1990); Reid
v. State, 224 Ga. App. 524, 481 S.E.2d 259 (1997); State in Interest of J.A.V., 558 So. 2d 214 (La. 1990);
State v. Richie, 376 S.W.3d 58 (Mo. Ct. App. E.D. 2012); In re Daniel B., 2 A.D.3d 440, 768 N.Y.S.2d 230
(2d Dep't 2003); State v. Klein, 267 Or. App. 348, 342 P.3d 89 (2014); Reed v. Com., 6 Va. App. 65, 366
S.E.2d 274 (1988); City of Sunnyside v. Lopez, 50 Wash. App. 786, 751 P.2d 313 (Div. 3 1988).
- 2 Zimmerman v. Doran, 807 F.3d 178 (7th Cir. 2015) (under Illinois law); Bradshaw v. District of Columbia,
43 A.3d 318 (D.C. 2012); Parks v. State, 304 Ga. App. 175, 695 S.E.2d 704 (2010); State v. Pentico, 151
Idaho 906, 265 P.3d 519 (Ct. App. 2011); State v. Gibson, 218 N.J. 277, 95 A.3d 110 (2014).
- 3 State v. Lucero, 265 Or. App. 328, 335 P.3d 1275 (2014).
- As to the requirement of knowledge, generally, see §§ 152 to 155.
- 4 Spingola v. State, 135 S.W.3d 330 (Tex. App. Houston 14th Dist. 2004).
- 5 Curtis v. State, 58 N.E.3d 992 (Ind. Ct. App. 2016).
- A person who is privileged or licensed to enter onto property may be prosecuted for defiant trespass if the
person refuses to leave after being told to do so, and the duration of the incursion—how long the person
"remains" unwelcome on the property—is a factor. *State v. Gibson*, 218 N.J. 277, 95 A.3d 110 (2014).
- 6 Turney v. State, 922 P.2d 283 (Alaska Ct. App. 1996).
- 7 Glispie v. State, 955 N.E.2d 819 (Ind. Ct. App. 2011).
- 8 Glispie v. State, 955 N.E.2d 819 (Ind. Ct. App. 2011).

End of Document

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75 Am. Jur. 2d Trespass § 167

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


5. Conduct Prohibited

c. Unlawful Remaining

§ 167. Unlawfully remaining on public or quasi-public property as criminal trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

Unlawful remaining, as applied to public buildings and surrounding property, requires that a trespasser refuse to ignore a contemporaneous order to leave.¹ In other words, notwithstanding that when a property is open to the public at the time of an alleged trespass the accused is presumed to have a license and privilege to be present, a statute which provides that a person commits a criminal trespass when he or she knowingly and without authority remains upon the land or premises of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart applies with equal force to publicly owned property.² However, for purposes of criminal trespass, an order to leave property open to the public is lawful only when an authorized person has some justification for requesting removal.³

Prohibitions against trespass upon real property after warning apply not only to privately owned property but also to quasi-public property.⁴ One who remains on privately owned property held open to the public, without a legitimate purpose, after being asked to leave by someone with authority, may be convicted of trespass.⁵ In other words, if premises are open to the public, the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void.⁶ Evidence that a defendant refuses to leave a store after being asked to leave is sufficient to sustain a conviction for criminal trespass.⁷ However, the mere presence in the parking lot of an open quasi-public business is insufficient to constitute the crime of trespass.⁸

For purposes of criminal trespass law, public housing projects should be afforded the same protection as private apartment buildings.⁹

CUMULATIVE SUPPLEMENT

Cases:

Mere fact that individual unlawfully present in fast food restaurant without buying anything from menu, and while refusing, for roughly ten minutes, either to make purchase or to leave, was given a break by not being immediately arrested for unlawful entry when police officer arrived, and by being allowed to leave, did not prevent police officer, when this individual turned around after exiting from restaurant and reentered just a couple of minutes later to ask for officer's name and badge number, from arresting individual for unlawful entry based, not on his reentry into restaurant to ask for identifying information from officer, but based his earlier, prolonged refusal to leave. [D.C. Code § 22-3302](#). [Rahman v. United States](#), 208 A.3d 734 (D.C. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Turney v. State](#), 922 P.2d 283 (Alaska Ct. App. 1996).
- 2 [U.S. v. Gilbert](#), 720 F. Supp. 1554 (N.D. Ga. 1989), order aff'd in part, rev'd in part on other grounds, 920 F.2d 878 (11th Cir. 1991).
An unruly person on public property with no lawful purpose may be convicted of misdemeanor trespassing. [State v. Occhino](#), 572 N.W.2d 316 (Minn. Ct. App. 1997).
- 3 [State v. Sanchez](#), 2014 ME 50, 89 A.3d 1084 (Me. 2014).
- 4 [Corn v. State](#), 332 So. 2d 4 (Fla. 1976) (mall).
- 5 [State v. Marcoplos](#), 154 N.C. App. 581, 572 S.E.2d 820 (2002), aff'd, 357 N.C. 245, 580 S.E.2d 691 (2003).
While the defendants had the privilege to enter a public airport for the purposes of using its restroom facilities, that privilege was not indefinite and was revoked once city police officers separately asked them to leave the property, and, once their privilege was revoked, criminal trespass was completed at the moment the defendants refused to leave. [Cleveland v. Dickerson](#), 2016-Ohio-806, 60 N.E.3d 686 (Ohio Ct. App. 8th Dist. Cuyahoga County 2016).
- 6 [State v. Marcoplos](#), 154 N.C. App. 581, 572 S.E.2d 820 (2002), aff'd, 357 N.C. 245, 580 S.E.2d 691 (2003).
- 7 [Bullock v. Jeon](#), 226 Ga. App. 875, 487 S.E.2d 692 (1997).
Under the Americans with Disabilities Act, the evidence was sufficient to show that a defendant was unlawfully on store premises, as required for third-degree criminal trespass; the defendant did not leave the store after being informed that she would not be allowed to remain in the store with her dog and being asked to leave by the store manager and police officer. [Satterwhite v. City of Auburn](#), 945 So. 2d 1076 (Ala. Crim. App. 2006).
- 8 [J.P. v. State](#), 855 So. 2d 1262 (Fla. 4th DCA 2003).
- 9 [People v. Carter](#), 169 Misc. 2d 230, 645 N.Y.S.2d 725 (N.Y. City Crim. Ct. 1996).
The evidence was insufficient to sustain a conviction for criminal trespass on a public road in a public housing project; while the officer testified that the road was actually the property of a housing project, there was no evidence that when stopped by a police officer the defendant's privilege to travel in a housing project had actually been revoked or that a revocation of the privilege had been conveyed to defendant. [Mullins v. City of Dothan](#), 724 So. 2d 83 (Ala. Crim. App. 1998).

75 Am. Jur. 2d Trespass § 168

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


6. Statutory Prohibitions As to Particular Property and Premises

a. Trespass on Government Lands and Federally Regulated Facilities

§ 168. Trespass on government lands; nuclear power facility

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

Various federal statutes prohibit trespasses upon federal lands, such as national parks,¹ national forest lands,² and federally regulated facilities, such as nuclear power installations.³

A state's trespass statute is capable of constitutional application to government-owned nonpublic forums, such as government office buildings, that are not open to the public for expressive activities.⁴

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Footnotes

- 1 [16 U.S.C.A. §§ 21, 22, 41, 43, 61, 91, 92, 122, 161, 201](#) (trespass provisions respecting specific national parks).
- 2 [18 U.S.C.A. § 1863](#).
- 3 [42 U.S.C.A. § 2278a](#).
As to the regulation of nuclear power facilities, generally, see [Am. Jur. 2d, Energy and Power Sources §§ 54 to 90](#).
- 4 [Pentico v. State, 159 Idaho 350, 360 P.3d 359 \(Ct. App. 2015\)](#).

End of Document

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75 Am. Jur. 2d Trespass § 169

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes


6. Statutory Prohibitions As to Particular Property and Premises

a. Trespass on Government Lands and Federally Regulated Facilities

§ 169. Trespass on military installation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

A.L.R. Library

[Validity, construction, and application of 18 U.S.C.A. sec. 1382, prohibiting trespass on military installation, 12 A.L.R. Fed. 638](#)

A federal statute penalizes entry upon a military installation for a purpose prohibited by law or lawful regulation and, further, penalizes any presence or reentry upon such an installation after removal therefrom or an order from the commanding officer not to reenter.¹ The order not to reenter may be made by any officer in command or charge,² and it is not necessary that the government justify the issuance of the exclusionary order in order to sustain a conviction for a violation of such reentry provision.³ The commanding officer of a military base has wide discretion as to whom to exclude from a military base, which will only be disturbed upon a showing that the ground for exclusion was patently arbitrary and discriminatory.⁴

Practice Tip:

The term "installation," as used in the federal criminal statute prohibiting any person from reentering a military post, fort, arsenal, yard, station, or installation after having been removed therefrom or ordered not to reenter by an officer or person in command thereof,⁵ is most naturally read as referring to a place with a defined boundary under the command of a military officer, and does not require the government to have exclusive use, possession, or control over the area for it to qualify as part of a military installation.⁶ When a place with a defined boundary is under the administration of a military department, the limits of the "military installation," for purposes of the criminal trespass statute, are coterminous with the commanding officer's area of responsibility, and those limits do not change when the commander invites the public to use a portion of the base for a road, a school, a bus stop, or a protest area, especially where the commander reserves authority to protect military property by, among other things, excluding vandals and trespassers.⁷

Unlike common law trespass, the federal statute prohibiting trespass on federal military installations requires that the initial entry be made for a prohibited purpose, but the purpose may be the unauthorized entry itself, where the defendant knows that entry is unauthorized.⁸ There is no requirement that the government prove improper motive or intent.⁹ Reentry of a military base, contrary to the commander's order, is a clear violation of the statute, notwithstanding the person's motives.¹⁰ Intent may be inferred from the circumstances.¹¹

Independent of any criminal trespass statutes, the commanding officer of a military installation has the right to summarily exclude civilians from the installation without giving notice or affording a hearing.¹²

Observation:

Prosecution under the federal statute does not offend due process requirements where the defendant had actual notice of the prohibition against entry of the military installation.¹³

The Posse Comitatus Act does not apply in a prosecution for unlawful entry into a naval installation such that a dismissal of the case against the defendants and the suppression of evidence on the basis of the statutory prohibition of the use of Army or Air Force personnel in civilian law enforcement was not warranted; the statute does not prohibit the use of the Navy in law enforcement, the military base on which the defendants trespassed was the under control of the United States Navy, and the statute is inapplicable to on-base violations by civilians.¹⁴

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Footnotes

¹ 18 U.S.C.A. § 1382.

As to military installations, generally, see [Am. Jur. 2d, Military and Civil Defense §§ 202 to 207](#).

A "purpose prohibited by law" may sometimes be established by reference to state law. [U.S. v. Patz](#), 584 F.2d 927 (9th Cir. 1978).

[U.S. v. Albertini](#), 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985).

[U.S. v. Jelinski](#), 411 F.2d 476 (5th Cir. 1969); [Weissman v. U.S.](#), 387 F.2d 271 (10th Cir. 1967).

[U.S. v. May](#), 622 F.2d 1000, 6 Fed. R. Evid. Serv. 1052 (9th Cir. 1980).

18 U.S.C.A. § 1382.

[U.S. v. Apel](#), 571 U.S. 359, 134 S. Ct. 1144, 186 L. Ed. 2d 75 (2014).

[U.S. v. Apel](#), 571 U.S. 359, 134 S. Ct. 1144, 186 L. Ed. 2d 75 (2014).

[U.S. v. Cottier](#), 759 F.2d 760 (9th Cir. 1985).

[U.S. v. Albertini](#), 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985); [U.S. v. Floyd](#), 477 F.2d 217 (10th Cir. 1973).

Proof of specific intent is not necessary for conviction. [U.S. v. Mowat](#), 582 F.2d 1194 (9th Cir. 1978).

[U.S. v. Bowers](#), 590 F. Supp. 307 (N.D. N.Y. 1983).

[U.S. v. Floyd](#), 477 F.2d 217 (10th Cir. 1973).

Perimeter warning signs and repeated verbal warnings by numerous military police that entry is prohibited and illegal sustains the conclusion that protesters who entered the base despite receiving warnings and reading the signs did so with the deliberate intention of committed prohibited acts. [U.S. v. Hall](#), 742 F.2d 1153 (9th Cir. 1984).

[U.S. v. Jelinski](#), 411 F.2d 476 (5th Cir. 1969); [Weissman v. U.S.](#), 387 F.2d 271 (10th Cir. 1967).

[U.S. v. Mowat](#), 582 F.2d 1194 (9th Cir. 1978).

Defendants, charged with unlawfully entering a United States Naval installation, had actual knowledge that they were trespassing illegally, such that their due process and ex post facto rights were not violated; the defendants admitted that a coast guard vessel approached their vessel and specifically warned them that they were entering a restricted area. [U.S. v. Ventura Melendez](#), 186 F. Supp. 2d 55 (D.P.R. 2001), *aff'd*, 321 F.3d 230 (1st Cir. 2003).

As to the First Amendment not precluding conviction under the federal statute prohibiting trespassing on federal military installations, see § 142.

As to the federal statute prohibiting trespassing on federal military installations being found not void for vagueness, see § 146.

[U.S. v. Santana](#), 184 F. Supp. 2d 131 (D.P.R. 2001), referring to 18 U.S.C.A. §§ 1382, 1385.

75 Am. Jur. 2d Trespass § 170

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

6. Statutory Prohibitions As to Particular Property and Premises


b. Trespass on School Premises

(1) In General

§ 170. Trespass on school premises, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

In many jurisdictions, statutes and ordinances forbid unauthorized persons to enter or remain upon school premises.¹

Observation:

Criminal trespass statutes may expand the protection otherwise afforded the public's property interest in its educational facilities and insure that the pursuit of authorized educational activities, as well as the property itself, will be free from unauthorized invasion; thus such statutes may protect college campuses from unauthorized use as well as from unauthorized disruption of college activities.²

The identity and authority of the person who has warned the defendant to leave the grounds of the school are essential elements of the offense of trespass upon the grounds of a school facility, which must be stated in the charging document and proved beyond a reasonable doubt at trial.³

A school loitering statute does not render inapplicable to schools a general trespass statute.⁴

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Footnotes

- 1 [In re Jimi A.](#), 209 Cal. App. 3d 482, 257 Cal. Rptr. 147, 52 Ed. Law Rep. 670 (4th Dist. 1989); [J.H. v. State](#), 220 So. 3d 508 (Fla. 3d DCA 2017); [Brooks v. State](#), 170 Ga. App. 440, 317 S.E.2d 552 (1984); [State v. Conk](#), 180 N.J. Super. 140, 434 A.2d 602 (App. Div. 1981); [People v. Leonard](#), 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 (1984).
For purposes of a statute providing that any person who does not have authorization, license, or invitation to enter or remain upon school property and who enters or remains upon the campus commits a trespass, "school property" means any part of the school's property; accordingly, a person who does not have authorization, license, or invitation to enter or remain upon a restricted area of the school property may be found guilty of violating the statute. [M.M. v. State](#), 187 So. 3d 300, 329 Ed. Law Rep. 587 (Fla. 5th DCA 2016).
- 2 [Brooks v. State](#), 170 Ga. App. 440, 317 S.E.2d 552 (1984).
- 3 [D.J. v. State](#), 67 So. 3d 1029, 271 Ed. Law Rep. 502 (Fla. 2011).
- 4 [In re C.](#), 66 Misc. 2d 907, 323 N.Y.S.2d 267 (Fam. Ct. 1971).

End of Document

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75 Am. Jur. 2d Trespass § 171

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

6. Statutory Prohibitions As to Particular Property and Premises


b. Trespass on School Premises

(1) In General

§ 171. Particular conduct as constituting trespass on school premises

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

A.L.R. Library

[Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 A.L.R.3d 340](#)

Conduct which constitutes trespass on school property includes—

- the selling or distribution of literature on¹ or near school property.²
- an attempt to exhibit photographs at a college after the defendant's invitation to do so had been withdrawn.³
- the forcible entry of an administration building of a university⁴ or
- the refusal to leave an administrative building when so ordered.⁵

A criminal trespass has been held not established or supportable where the defendants escorted children to or from school.⁶

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Footnotes

- 1 [State v. Maloney](#), 78 Wash. 2d 922, 481 P.2d 1 (1971).
- 2 [People v. Sprowal](#), 49 Misc. 2d 806, 268 N.Y.S.2d 444 (App. Term 1966), *aff'd*, 17 N.Y.2d 884, 271 N.Y.S.2d 310, 218 N.E.2d 343 (1966).
Where the defendant admitted, in a prosecution for criminal trespass, that he was distributing literature on a college campus without a permit, as required by a rule of the college, and that even after he was told this was not allowed he repeatedly refused to stop this activity, the defendant's conviction was not against the weight of the evidence. [City of Parma v. Manning](#), 33 Ohio App. 3d 67, 514 N.E.2d 749, 42 Ed. Law Rep. 899 (8th Dist. Cuyahoga County 1986).
- 3 [Kirstel v. State](#), 13 Md. App. 482, 284 A.2d 12, 50 A.L.R.3d 328 (1971).
- 4 [Dean v. State](#), 13 Md. App. 654, 285 A.2d 295 (1971).
- 5 [State v. Silva](#), 86 N.M. 543, 1974-NMCA-072, 525 P.2d 903 (Ct. App. 1974) (by implication).
- 6 [People v. Bennett](#), 66 Misc. 2d 15, 319 N.Y.S.2d 622 (County Ct. 1971).

End of Document

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75 Am. Jur. 2d Trespass § 172

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

6. Statutory Prohibitions As to Particular Property and Premises


b. Trespass on School Premises

(2) Constitutionality

§ 172. Constitutionality of statutes forbidding trespass on school property, generally; police power

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  [76](#) to [79](#), [81](#), [82](#)

A.L.R. Library

[Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 A.L.R.3d 340](#)

Statutes and ordinances forbidding unauthorized persons to enter or remain upon school premises are within the police power of the state.¹ There is no constitutional impediment to the enforcement of the general criminal trespass statute on state college campuses.² The right to exclude an unauthorized disruptive presence on state college campuses derives from the state's powers of property owner to limit the use of public property to that for which it has been dedicated and from the power to protect the peaceful conduct of those educational activities which have been authorized to take place there.³ Thus any order barring a person from a campus, as a basis for a criminal prosecution for trespass, must be shown to have had a legitimate purpose, rationally related to the power to maintain order on the campus, or that its enforcement violated no independent right of the defendant and the defendant's conviction for trespass should be vacated.⁴ However, the fact that a university serves a quasi-public service and is a funded part of the state education system does not alter its character as a private educational institution,

and persons not affiliated with the university have no right to enter and use its facilities, including a law library, unless the university grants that person a privilege or license to do so.⁵

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Footnotes

- 1 [People v. Parker](#), 208 Misc. 978, 138 N.Y.S.2d 2 (Magis. Ct. 1955).
- 2 [Grattan v. Board of School Com'rs of Baltimore City](#), 805 F.2d 1160, 36 Ed. Law Rep. 56 (4th Cir. 1986); [Braxton v. Municipal Court](#), 10 Cal. 3d 138, 109 Cal. Rptr. 897, 514 P.2d 697 (1973); [Brooks v. State](#), 170 Ga. App. 440, 317 S.E.2d 552 (1984); [People v. Barnett](#), 7 Ill. App. 3d 185, 287 N.E.2d 247 (1st Dist. 1972); [Kirstel v. State](#), 13 Md. App. 482, 284 A.2d 12, 50 A.L.R.3d 328 (1971) (free speech and assembly).
- 3 [Brooks v. State](#), 170 Ga. App. 440, 317 S.E.2d 552 (1984).
Where the defendant cursed the principal, held her in a headlock, and acted in a belligerent fashion when asked to leave the campus and wait outside, the evidence before the court that the defendant's conduct interfered with the peaceful conduct of the activities of the school by sufficient affirmative acts of disturbance. [In re Jimi A.](#), 209 Cal. App. 3d 482, 257 Cal. Rptr. 147, 52 Ed. Law Rep. 670 (4th Dist. 1989).
- 4 [People v. Leonard](#), 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 (1984).
- 5 [Com. v. Downing](#), 511 Pa. 28, 511 A.2d 792, 33 Ed. Law Rep. 770 (1986).

End of Document

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75 Am. Jur. 2d Trespass § 173

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

6. Statutory Prohibitions As to Particular Property and Premises


b. Trespass on School Premises

(2) Constitutionality

§ 173. Equal protection under school trespass laws

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

School trespass laws, which apply to whoever refuses or fails to leave after being requested to do so by an authorized employee, do not discriminate against a class of persons,¹ as by unequal application or enforcement, in violation of the equal protection of the laws.²

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Footnotes

¹ [Dean v. State](#), 13 Md. App. 654, 285 A.2d 295 (1971).

² [Anderson v. Shaver](#), 290 F. Supp. 920 (D.N.M. 1968).

Where in the absence of any evidence that the officials of a junior college had been selective in enforcing the right to have the campus free from any and all unauthorized use, a defendants' motion for dismissal of a criminal trespass accusation on the ground of selective prosecution was correctly denied because there was no showing of purposeful discrimination. [Brooks v. State](#), 170 Ga. App. 440, 317 S.E.2d 552 (1984).

75 Am. Jur. 2d Trespass § 174

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

6. Statutory Prohibitions As to Particular Property and Premises


b. Trespass on School Premises

(2) Constitutionality

§ 174. Due process under school trespass laws; notice and hearing

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

School trespass laws do not deprive a person of due process of law by failing to provide for a hearing.¹

Although a defendant who leaves school premises when requested to do so is entitled to a hearing,² any right to a hearing is waived by a defendant who refuses to leave such premises when requested to do so.³ Charging a person with willfully and unlawfully trespassing on school property in violation of a municipal ordinance, where numerous different and separate kinds of conduct are characterized as criminal trespass with respect to school property, is insufficient to adequately notify the defendant of the charges against him or her.⁴

School trespass statutes also have survived constitutional attack based on allegations of vagueness⁵ and overbreadth.⁶ However, a state statute making it a misdemeanor for any person to refuse to leave the premises of any institution established for the purpose of the education of students enrolled therein when so requested, regardless of the reason, by the duly constituted officials of any such institution is unconstitutionally overbroad.⁷ A law is unconstitutionally overbroad which gives no guide as to what conduct is considered to be "disrupting" or as to what constitutes "reasonable justification or excuse" to disobey an order to leave the school premises upon request.⁸

Footnotes

- 1 Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971); Braxton v. Municipal Court, 10 Cal. 3d 138, 109 Cal. Rptr. 897, 514 P.2d 697 (1973).
- 2 Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971).
- 3 Kirstel v. State, 13 Md. App. 482, 284 A.2d 12, 50 A.L.R.3d 328 (1971).
- 4 In re Rudolfo A., 110 Cal. App. 3d 845, 168 Cal. Rptr. 338 (2d Dist. 1980).
- 5 Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971); Anderson v. Shaver, 290 F. Supp. 920 (D.N.M. 1968); Mandel v. Municipal Court for Oakland-Piedmont Judicial Dist., Alameda County, 276 Cal. App. 2d 649, 81 Cal. Rptr. 173 (1st Dist. 1969); State v. Silva, 86 N.M. 543, 1974-NMCA-072, 525 P.2d 903 (Ct. App. 1974).
A criminal trespass statute is not unconstitutionally vague because it fails to specify a limitations period for the school official's order to a trespasser to leave the school campus and because it fails to define the meaning of "legitimate business on the campus," because a public school official is entitled to bar indefinitely unauthorized persons from being on campus and the phrase legitimate business on campus is sufficiently definite for constitutional purposes to describe the type of activity that a person must lack in order to expose oneself to a possible criminal liability under the statute. *A.C. v. State*, 538 So. 2d 136, 52 Ed. Law Rep. 827 (Fla. 3d DCA 1989).
As to the vagueness of terms in criminal trespass statutes, generally, see §§ 144 to 147.
- 6 Braxton v. Municipal Court, 10 Cal. 3d 138, 109 Cal. Rptr. 897, 514 P.2d 697 (1973); *People v. Witzkowski*, 53 Ill. 2d 216, 290 N.E.2d 236 (1972); Kirstel v. State, 13 Md. App. 482, 284 A.2d 12, 50 A.L.R.3d 328 (1971); *State v. Sullivan*, 189 Neb. 465, 203 N.W.2d 169 (1973); *Silva v. State*, 86 N.M. 528, 525 P.2d 888 (1974).
- 7 Grody v. State, 257 Ind. 651, 278 N.E.2d 280 (1972).
- 8 Smith v. Sheeter, 402 F. Supp. 624 (S.D. Ohio 1975).

End of Document

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75 Am. Jur. 2d Trespass § 175

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VI. Criminal Liability

B. Application of Statutes

6. Statutory Prohibitions As to Particular Property and Premises


b. Trespass on School Premises

(2) Constitutionality

§ 175. First Amendment rights under school trespass laws

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  76 to 79, 81, 82

School trespass statutes have withstood constitutional attack on First Amendment grounds,¹ except where such laws in effect give school officials unfettered discretion as to the reasons for which they could ask persons to leave the premises.²

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Footnotes

¹ [People v. Barnett](#), 7 Ill. App. 3d 185, 287 N.E.2d 247 (1st Dist. 1972); [Kirstel v. State](#), 13 Md. App. 482, 284 A.2d 12, 50 A.L.R.3d 328 (1971); [People v. Sprowal](#), 49 Misc. 2d 806, 268 N.Y.S.2d 444 (App. Term 1966), *aff'd*, 17 N.Y.2d 884, 271 N.Y.S.2d 310, 218 N.E.2d 343 (1966).

A defendant who was arrested for criminal trespassing after refusing to leave a monument site that a state university had reserved for private communication had no First Amendment right to engage in public communication in the form of preaching at that site; the university could, consistent with its mission of education, enforce a policy requiring a quiet atmosphere at that site. [State v. Spingola](#), 136 Ohio App. 3d 136, 736 N.E.2d 48, 147 Ed. Law Rep. 283 (4th Dist. Athens County 1999).

A school board did not violate the First Amendment rights of teacher's union representative when it refused to allow him to distribute union literature in the school parking lot, under a statute permitting the board to deny access to school grounds to anyone who did not have lawful business to pursue at the school, because the parking lot was not a public forum, the representative was not conducting lawful business, and the

literature was not political in nature. [Grattan v. Board of School Com'rs of Baltimore City](#), 805 F.2d 1160, 36 Ed. Law Rep. 56 (4th Cir. 1986).

As to First Amendment rights and criminal trespass statutes, generally, see §§ 141 to 143.

2

[Grody v. State](#), 257 Ind. 651, 278 N.E.2d 280 (1972).

A university student's action of climbing a tree on a university campus, and remaining there after being ordered by a police officer and a university official to descend, amounted to "speech" protected by the First Amendment and did not amount to an unlawful trespass, absent evidence that the student's presence in the tree was incompatible with the university's normal activities, where the student was lawfully enrolled and therefore licensed to be on the property, the university policy manual was unclear as to whether tree-sitting was a lawful First Amendment expressive activity if engaged in prior to 5:00 p.m., the student was well-equipped and wearing safety gear, and the student's activities while in the tree were no different from those that would be engaged in by an individual picketing on the ground. [People v. Millhollen](#), 5 Misc. 3d 810, 786 N.Y.S.2d 703, 194 Ed. Law Rep. 395 (N.Y. City Ct. 2004).

End of Document

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75 Am. Jur. 2d Trespass VII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  32 to 35

A.L.R. Library

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  32 to 35

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75 Am. Jur. 2d Trespass § 176

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

1. Limitation of Actions

§ 176. Limitations periods for trespass actions, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  35

A.L.R. Library

[Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438](#)

A statute which establishes a limitations period in an action for trespass to real property commences running at the occurrence of the first actual damages.¹

Where the original entry was privileged, an action for trespass does not accrue until the property owner has withdrawn or revoked the consent to a privileged use, and the statute of limitations does not run during the period of permitted use.² Furthermore, in the case of a use which was not authorized by the original license or privilege, the statute of limitations begins to run only at the time of the revocation of the license, and not from the commencement of the unauthorized use of the property.³

Practice Tip:

In some jurisdictions, in order to bring an action against a municipality, including one sounding in trespass, statutes provide that a notice of claim must be served upon the municipality within a limited number of days, and failure to serve such notice may result in dismissal of the action; however, the failure to serve a notice of claim has been excused in cases in which the primary relief sought was equitable in nature and monetary damages were incidental.⁴

A general limitations period for intentional torts, rather than the specific limitations period for negligence and nuisance claims, may govern a claim of intentional trespass.⁵

A statute of limitations also will apply to a cause of action sounding in a trespass to chattel.⁶

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Footnotes

- 1 [Butler v. Lindsey](#), 293 S.C. 466, 361 S.E.2d 621 (Ct. App. 1987).
A property owner's claims against a contractor for trespass accrued upon substantial completion of the work, irrespective of when damage to the owner's water mains was actually discovered. [Suffolk County Water Authority v. J.D. Posillico, Inc.](#), 267 A.D.2d 301, 700 N.Y.S.2d 45 (2d Dep't 1999).
- 2 [Merrill Stevens Dry Dock Co. v. G & J Investments Corp., Inc.](#), 506 So. 2d 30 (Fla. 3d DCA 1987).
- 3 [Merrill Stevens Dry Dock Co. v. G & J Investments Corp., Inc.](#), 506 So. 2d 30 (Fla. 3d DCA 1987).
- 4 [Clempner v. Town of Southold](#), 154 A.D.2d 421, 546 N.Y.S.2d 101 (2d Dep't 1989).
- 5 [Munger v. Seehafer](#), 2016 WI App 89, 372 Wis. 2d 749, 890 N.W.2d 22 (Ct. App. 2016).
- 6 [Ruddy v. Citibank, N.A.](#), 224 A.D.2d 509, 637 N.Y.S.2d 793 (2d Dep't 1996).

End of Document

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75 Am. Jur. 2d Trespass § 177

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

1. Limitation of Actions

§ 177. Limitations periods for continuing trespasses

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  35

A.L.R. Library

[Accrual of Claims for Continuing Trespass or Continuing Nuisance for Purposes of Statutory Limitations](#), 14 A.L.R.7th Art. 8

A trespass is characterized as "continuing" to acknowledge that multiple acts of trespass have occurred, and continue to occur, and that, in the event the statute of limitations has run on prior acts of trespass, recovery will only be allowed for those acts which are litigated in a timely fashion¹ after the discovery of the trespass.² A continuing trespass gives rise to successive causes of action each time there is an interference with a person's property, and thus, if there are multiple acts of trespass, then there are multiple causes of action, and the statute of limitations begins to run anew with each act.³

An action predicated upon a continuous trespass is barred only by the expiration of such time that would create an easement by prescription or change title by operation of law.⁴

If a trespass is followed by an injury constituting a continuing nuisance, damages for the original trespass must all be recovered in one action, but successive actions may be brought to recover damages for a continuation of the wrongful conditions, and in these actions the damages are estimated only to the date of the bringing of each suit, and the statute of limitations does not begin to run from the date of the original trespass.⁵

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Footnotes

- 1 [Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc., 2002 UT 53, 52 P.3d 1133 \(Utah 2002\).](#)
[As to remedy for continuing trespass, see § 93.](#)
- 2 [Carr v. Town of Fleming, 122 A.D.2d 540, 504 N.Y.S.2d 904 \(4th Dep't 1986\).](#)
- 3 [Rickel v. Komaromi, 144 Conn. App. 775, 73 A.3d 851 \(2013\).](#)
- 4 [Carr v. Town of Fleming, 122 A.D.2d 540, 504 N.Y.S.2d 904 \(4th Dep't 1986\).](#)
- 5 [Cook v. DeSoto Fuels, Inc., 169 S.W.3d 94 \(Mo. Ct. App. E.D. 2005\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 178

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

1. Limitation of Actions

§ 178. Limitations periods for continuing trespasses —Effect of permanency of offending structures

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  35

Offending structures causing continuing trespasses and recurring damages are not susceptible to a simplistic application of a statute of limitations.¹ Where actions for damages to real property must be brought within five years of construction of the complained-of structure on the property, such a statutory limitation does not apply to a continuing trespass on the plaintiff's property, such as a storm sewer underground, but pertains to permanent structures built on neighboring land.² If the offending structure is permanent and negligently or unlawfully built or maintained, recurring recoveries for trespass may be had as the injuries occur.³

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Footnotes

- ¹ [Wimmer v. City of Ft. Thomas, 733 S.W.2d 759 \(Ky. Ct. App. 1987\).](#)
- ² [Rosenthal v. City of Crystal Lake, 171 Ill. App. 3d 428, 121 Ill. Dec. 869, 525 N.E.2d 1176 \(2d Dist. 1988\).](#)
- ³ [Wimmer v. City of Ft. Thomas, 733 S.W.2d 759 \(Ky. Ct. App. 1987\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 179

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

1. Limitation of Actions

§ 179. Limitations periods for continuing trespasses —Applications of particular statutory time periods

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  35

A.L.R. Library

[Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 A.L.R.3d 760](#)

In the case of a statutory limitation period of a certain number of years, where a continuing trespass began more than five years prior to the filing an action, the statute of limitations does not bar the action entirely but limits recovery to a period of the specified number of years immediately prior to suit.¹

Where a statute provides a 15-year limitation period, the fact that a plaintiff waits 14 years to assert his or her rights against another's continuous trespass by encroachment on the land does not, by laches, bar an action for recovery of possession brought within the 15-year limitation period.²

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Footnotes

- 1 Rosenthal v. City of Crystal Lake, 171 Ill. App. 3d 428, 121 Ill. Dec. 869, 525 N.E.2d 1176 (2d Dist. 1988);
Cook v. DeSoto Fuels, Inc., 169 S.W.3d 94 (Mo. Ct. App. E.D. 2005); Haas v. Sunset Ramblers Motorcycle
Club, Inc., 132 Ohio App. 3d 875, 1999-Ohio-764, 726 N.E.2d 612 (3d Dist. Crawford County 1999).
- 2 Difronzo v. Village of Port Sanilac, 166 Mich. App. 148, 419 N.W.2d 756 (1988) (stating that the question
of whether the plaintiff could be precluded from all or part of the relief sought as a result of laches was not
before the appellate court).

End of Document

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75 Am. Jur. 2d Trespass § 180

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

2. Jurisdiction and Venue

§ 180. Jurisdiction for trespass actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  32, 33

A.L.R. Library

[Jurisdiction of action at law for damages for tort concerning real property in another state or country](#), 30 A.L.R.2d 1219

A tort action for trespass is of a type not generally cognizable in a chancery court.¹ However, a circuit court had jurisdiction to determine the ownership of land upon which timber was grown, in an action for trespass brought by a timber deed grantee, where proof of ownership in the property was submitted as part of the trespass claim.²

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- ¹ [Dugal Logging, Inc. v. Arkansas Pulpwood Co.](#), 66 Ark. App. 22, 988 S.W.2d 25 (1999).
² [Dugal Logging, Inc. v. Arkansas Pulpwood Co.](#), 66 Ark. App. 22, 988 S.W.2d 25 (1999).

End of Document

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75 Am. Jur. 2d Trespass § 181

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

A. In General

2. Jurisdiction and Venue

§ 181. Venue for trespass actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  34

Venue consideration may bar the bringing of a trespass action.¹

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¹ [Piven v. Comcast Corp.](#), 168 Md. App. 221, 895 A.2d 1118 (2006), judgment *aff'd*, 397 Md. 278, 916 A.2d 984 (2007).

End of Document

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75 Am. Jur. 2d Trespass VII B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VII. Practice and Procedure

B. Pleadings

[Topic Summary](#) | [Correlation Table](#)


Research References

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  39 to 42

A.L.R. Library

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  39 to 42

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75 Am. Jur. 2d Trespass § 182

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure


B. Pleadings

1. Declaration, Petition, or Complaint

§ 182. Declaration, petition, or complaint in trespass action, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  39 to 40(4)

Forms

[Am. Jur. Pleading and Practice Forms, Trespass §§ 5 to 23](#) (Complaint, petition, or declaration—Trespass to real property)

[Am. Jur. Pleading and Practice Forms, Trespass §§ 24 to 26](#) (Complaint, petition, or declaration—Possession of land)

[Am. Jur. Pleading and Practice Forms, Trespass §§ 27 to 50](#) (Complaint, petition, or declaration—Acts constituting trespass)

A complaint that adequately alleges a defendant's intentional and unlawful interference with a plaintiff's right to the possession of certain real property and resultant damages states a cause of action for trespass.¹

Since in order to maintain trespass to real property, the plaintiff must be in either actual or constructive possession thereof, his or her declaration must allege title or possession.² A plaintiff may not maintain a trespass claim where the complaint does not allege that the plaintiff has the right to possess the land.³

While general damages for trespass would be injury to the land itself, lost profits are special damages that must be specifically pleaded because they depend on circumstances unrelated to the trespass, that is, the owner's plans for the property.⁴

Footnotes

- 1 [Ain v. Glazer](#), 257 A.D.2d 422, 683 N.Y.S.2d 241 (1st Dep't 1999).
Allegations that a neighbor constructed and maintained upon an owner's land "debris, a fill area consisting of dirt and debris, and a tie wall consisting of wood and debris approximately 11 feet in height" and that such debris, fill area, and tie wall were constructed and maintained "over [owner's] objection" stated a claim for trespass; allegations taken as true showed that the neighbor entered upon the owner's land and that such entry was unauthorized. [Rosenfeld v. Thoele](#), 28 S.W.3d 446 (Mo. Ct. App. E.D. 2000).
- 2 [Denham v. Cuddeback](#), 210 Or. 485, 311 P.2d 1014 (1957).
Allegations that the plaintiffs owned the real property in question and that a town and its officials had not only interfered with their property rights but also had asserted an ownership interest in such land were sufficient to state a cause of action for trespass. [Ferran v. Belawa](#), 241 A.D.2d 841, 660 N.Y.S.2d 488 (3d Dep't 1997).
- 3 [Cornick v. Forever Wild Development](#), 240 A.D.2d 980, 659 N.Y.S.2d 914 (3d Dep't 1997).
- 4 [Weyerhaeuser Co. v. Brantley](#), 510 F.3d 1256 (10th Cir. 2007).

End of Document

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75 Am. Jur. 2d Trespass § 183

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

B. Pleadings

1. Declaration, Petition, or Complaint

§ 183. Pleading statutory and punitive damages in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  40(5)

If the facts alleged by the plaintiff in a trespass action seeking damages show that the trespass was inflicted with malice, oppression, or other like circumstances of aggravation, punitive or exemplary damages may be recovered without being specially pleaded.¹ Assuming that the other necessary elements for an award of punitive damages are pleaded and proved, a plaintiff is entitled to have the case submitted to the jury for an award of punitive damages.²

Statutory damages and punitive damages arising out of the same cause of action for trespass are not mutually exclusive.³ Thus where the plaintiff pleads entitlement to punitive damages in an action for trespass, a defendant who consents to the trial of the plaintiff's cause as pleaded may not subsequently on appeal contend that the plaintiff was limited to the recovery of treble damages pursuant to statute.⁴

Observation:

Ordinarily, an election of remedies should be made before the case is submitted to the trier of fact; defense counsel are cautioned that where the propriety of a jury award of statutory treble damages is first raised in a defense motion for a new trial, the plaintiffs may gain the advantage of hindsight and elect to recover the higher of the two awards.⁵

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Footnotes

- 1 [Rhodes v. Harwood](#), 273 Or. 903, 544 P.2d 147 (1975).
A trespass claim asserted against the owner of adjacent property, which was based on the use of property in excess of the scope of a roadway easement possessed by the adjacent owner, sufficiently alleged a punitive damages claim to put the adjacent owner on notice of the substance of the claim and avoid dismissal. [Apel v. Katz](#), 83 Ohio St. 3d 11, 1998-Ohio-420, 697 N.E.2d 600 (1998).
As to punitive damages, generally, see §§ 121 to 125.
- 2 [Rhodes v. Harwood](#), 273 Or. 903, 544 P.2d 147 (1975).
- 3 [Baker v. Ramirez](#), 190 Cal. App. 3d 1123, 235 Cal. Rptr. 857 (5th Dist. 1987).
- 4 [Johnson v. Jensen](#), 446 N.W.2d 664 (Minn. 1989).
- 5 As to the statutory provision for multiple damages, generally, see §§ 126 to 129.
[Johnson v. Jensen](#), 446 N.W.2d 664 (Minn. 1989).

End of Document

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75 Am. Jur. 2d Trespass § 184

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

B. Pleadings

1. Declaration, Petition, or Complaint

§ 184. Criminal trespass complaint; indictment or information

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  39 to 40(4)

An information that omits an essential element of the crime charged is defective and cannot serve as the basis of a conviction.¹ However, whether the initial entry is lawful is irrelevant to a trespass based upon a statute prohibiting the remaining upon the land after notice is given to depart, without regard to the lawfulness of the initial entry, and, thus, it was not necessary for the state to allege in the complaint that the defendant was wrongfully on the land.²

There is no unconstitutionally impermissible vagueness in charging, simultaneously, that a defendant acted intentionally, knowingly, recklessly, or negligently in committing criminal trespass, although the complaint merely alleges that the defendant entered the victims' home, as the state is charging that the defendant possessed all of those states of mind.³

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Footnotes

- ¹ [State v. Kreth](#), 150 Vt. 406, 553 A.2d 554 (1988).
- ² [People v. Mortenson](#), 178 Ill. App. 3d 871, 128 Ill. Dec. 46, 533 N.E.2d 1134 (2d Dist. 1989).
- ³ [Com. v. Chamberlain](#), 612 Pa. 107, 30 A.3d 381 (2011).

End of Document

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75 Am. Jur. 2d Trespass § 185

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

B. Pleadings

2. Plea or Answer

§ 185. Plea or answer in trespass action, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  41

Forms

[Am. Jur. Pleading and Practice Forms, Trespass §§ 76 to 85](#) (Answer—Counterclaim or defense)

Under the plea of the general issue, both the fact of the trespass and the title of the plaintiff are put in issue, and any title in the defendant, whether freehold or possessory, is admissible in evidence.¹

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¹ [Denham v. Cuddeback, 210 Or. 485, 311 P.2d 1014 \(1957\).](#)

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75 Am. Jur. 2d Trespass § 186

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

B. Pleadings

2. Plea or Answer

§ 186. Pleading affirmative defenses in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  41

In an action of trespass, no affirmative defense is available to the defendant under a general denial.¹

In a trespass action, a defendant may assert that the entry was lawful or under legal right as an affirmative defense.²

The statute of limitations defense is also an affirmative defense to trespass that must be raised in the trial court by pleading or by motion before it will be considered on appeal; thus, where the defendant fails to allege anywhere in its answer to the plaintiff's action for trespass that it was barred by the statute of limitations, the defense may not subsequently be raised on appeal.³

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Footnotes

- ¹ [Stone Resources, Inc. v. Barnett](#), 661 S.W.2d 148 (Tex. App. Houston 1st Dist. 1983) (abrogated on other grounds by, [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015)).
- ² [Singleton v. Haywood Elec. Membership Corp.](#), 357 N.C. 623, 588 S.E.2d 871 (2003).
- ³ [MacWillie v. Southeast Alabama Gas Dist.](#), 539 So. 2d 245 (Ala. 1989).
As to limitation of actions, see §§ 176 to 179.

End of Document

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75 Am. Jur. 2d Trespass § 187

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

B. Pleadings

2. Plea or Answer

§ 187. Pleading counterclaims in trespass action; setoff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  41, 42

A.L.R. Library

[Cause of action in tort as counterclaim in tort action](#), 10 A.L.R.2d 1167

In jurisdictions requiring that a counterclaim arise out of the same transaction or circumstances as the plaintiff's claim, one independent trespass cannot be used as a setoff against another trespass arising from the same circumstance.¹

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Footnotes

¹ [Baitary v. Ilderton](#), 214 S.C. 357, 52 S.E.2d 417, 10 A.L.R.2d 1163 (1949).

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75 Am. Jur. 2d Trespass VII C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.


VII. Practice and Procedure

C. Evidence

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44 to 46(3)

A.L.R. Library

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  44 to 46(3)

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75 Am. Jur. 2d Trespass § 188

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

1. In General

§ 188. Evidence in trespass action, generally; presumptions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44, 46 to 46(3)

In a trespass action, the general rules of evidence apply.¹ Thus, for example, testimony that is relevant is admissible, while evidence that is irrelevant should not be admitted.²

When trespass has occurred, the law presumes that damages resulted, and while the plaintiff must prove actual damages, the plaintiff may still recover nominal damages even without proof of actual damages, simply upon proof of trespass.³

When property is open to the public at the time of an alleged criminal trespass, the accused is presumed to have a license and privilege to be present.⁴

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Footnotes

¹ [Batchelder v. Kelly](#), 10 N.H. 436, 1839 WL 1483 (1839).

² [Ross v. Rosen-Rager](#), 67 So. 3d 29 (Ala. 2010).

³ [Bellinger v. Lindsey](#), 480 S.W.3d 345 (Mo. Ct. App. E.D. 2015).

As to nominal damages, generally, see § 115.

⁴ [People v. Leonard](#), 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 (1984).

End of Document

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75 Am. Jur. 2d Trespass § 189

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

1. In General

§ 189. Sufficiency of evidence in trespass action; circumstantial evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44, 46 to 46(3)

In order to recover compensatory damages for trespass, it must be shown that the trespass proximately caused harm for which the compensation is sought, and the amount of damage must be proved by a preponderance of the evidence,¹ and this burden may be met by either direct or circumstantial evidence.² Where there has occurred a trespass, general damages do not have to be proven with any amount to an absolute certainty for recovery of such damages.³

That a purchaser of real estate was a bona fide purchaser for value without notice is an affirmative defense in a civil action for trespass and must be sustained by competent proof.⁴

The proven facts must be inconsistent with innocence in order to uphold a conviction for criminal trespass on circumstantial evidence.⁵

A property owner's testimony that she did not give a trespasser permission to cut trees on her property and that she told the trespasser she wanted him to leave her property was sufficient to support a finding that the property owner did not consent to the trespasser's removal of timber from her property.⁶ Similarly, a landowner's testimony that she did not cut any vegetation other than on her own property and did not direct her husband to do so was sufficient to support a finding for the landowner on the neighbors' claim against the landowner for damages based on the alleged unauthorized cutting of vegetation on the neighbors' property.⁷

When evidence of the effect of a timber trespass on the market value of real property is not available, the value of the property must be ascertained through other evidence that provides an objective—rather than a subjective—indicator of the real value of the loss to the property caused by destruction of the trees.⁸

Where common law trespass is established, punitive damages may be awarded where there is clear and convincing evidence that the trespass was malicious, willful, intentional or reckless.⁹

CUMULATIVE SUPPLEMENT

Cases:

Landowner's claim of inability to develop additional automobile dealership on property which contained one dealership was too speculative to support award of lost profit damages, in landowner's action against city for trespass and nuisance arising out of city's use of sewer line on property after revocation of license to do so; landowner's expert offered no assessment of probability that landowner would obtain necessary regulatory approvals, and landowner's own testimony highlighted uncertainty of obtaining a dealer franchise and securing financing to build a second building. [Boyle v. City of Portsmouth](#), 172 N.H. 781, 235 A.3d 985 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Bayou Fleet Partnership v. Clulee](#), 150 So. 3d 329 (La. Ct. App. 5th Cir. 2014); [Brewer v. Dick Lavy Farms, L.L.C.](#), 2016-Ohio-4577, 67 N.E.3d 196 (Ohio Ct. App. 2d Dist. Darke County 2016).
Statutory trespass penalty awarded to landowners for the purported owner cutting their trees without their permission needed only to be proved by a preponderance of evidence, rather than the clear and convincing standard applicable to punitive damages, where the tree-cutting statute provided that punitive damages could not be awarded, and the landowners sought and received damages under the tree-cutting statute and not punitive damages. [Taylor v. Galloway](#), 189 So. 3d 1288 (Miss. Ct. App. 2016).
- 2 [Bayou Fleet Partnership v. Clulee](#), 150 So. 3d 329 (La. Ct. App. 5th Cir. 2014).
To prove a cause of action for a wrongful timber cutting by a preponderance of the evidence, landowners were required to prove that it was more probable than not that the logging contractor cut their timber; either direct or circumstantial evidence would satisfy the burden, and circumstantial evidence alone would satisfy the burden if it excluded other reasonable hypotheses with a fair amount of certainty so that it was more probable than not that the contractor cut the landowners' timber for the logging company. [Isdale v. Carman](#), 692 So. 2d 687 (La. Ct. App. 3d Cir. 1997).
- 3 [Lanier v. Burnette](#), 245 Ga. App. 566, 538 S.E.2d 476 (2000).
Substantial evidence supported a trial court's factual finding that a neighbors' elevation of roadbed caused \$50,000 in damages, as a result of the common law trespass, where a certified real estate appraiser testified that the elevation of the roadbed by several feet steepened the terrain and reduced the landowners' access to their property, requiring approximately \$50,000 in additional development costs to remedy. [Ridgway v. TTnT Development Corp.](#), 126 S.W.3d 807 (Mo. Ct. App. S.D. 2004).
The evidence was legally sufficient to establish a diminution in the market value of an owner's real property for the purposes of the owner's trespass claims against a waste disposal company for the recovery of property damage allegedly caused by contamination from the landfill; the owner testified that she paid \$45,000 for the property, the property was not currently worth anything, and she would not want to sell the property to another person because she would not want to give another family the problems that she had endured. [Waste Disposal Center, Inc. v. Larson](#), 74 S.W.3d 578 (Tex. App. Corpus Christi 2002).

- 4 Wicker v. Harvey, 937 So. 2d 983 (Miss. Ct. App. 2006).
- 5 McGinnis v. State, 183 Ga. App. 17, 358 S.E.2d 269 (1987).
- 6 Harris v. Nelson, 25 S.W.3d 917 (Tex. App. Beaumont 2000).
- 7 Kienzle v. Myers, 167 Ohio App. 3d 78, 2006-Ohio-2765, 853 N.E.2d 1203 (6th Dist. Wood County 2006).
- 8 Cohen v. Awbrey Glen Homeowners Association, Inc., 283 Or. App. 244, 388 P.3d 1160 (2016).
- 9 International Broth. of Elec. Workers v. Monsees, 335 S.W.3d 105 (Mo. Ct. App. W.D. 2011).

End of Document

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75 Am. Jur. 2d Trespass § 190

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

2. Burden of Proof

§ 190. Burden of proof in trespass action, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44

Generally speaking, in actions of trespass, as in all other actions, the burden of proof rests upon the party who initiates the action.¹ Thus the party claiming a trespass has the burden of proving his or her ownership² or possession of the property³ and that the defendant made an unauthorized entry onto the plaintiff's land in order to prevail.⁴

Practice Tip:

The landowner or possessor who is bringing suit is in the best position to provide evidence on whether an alleged trespasser's presence was unauthorized because only someone acting with the authority of the landowner or one with rightful possession can authorize, or consent to, the entry.⁵

Once a plaintiff has proven ownership of the property or a lawful right of possession and an entry by the defendant, the burden of proof falls upon the defendant to plead and prove consent or license as a justification for the entry.⁶ However, it has been said that requiring a trespass defendant to carry the burden of proof on an element that is also fundamental to the plaintiff's prima facie case obviates the tort, and where there is a consensual entry, there is no tort, because lack of consent is an element of the

wrong, so the burden is not on the defendant to show consent, as lack of consent is an element of a trespass claim.⁷ Once a timber trespass is established, the burden shifts to the defendant to show it was not willful or reckless, but rather was casual or involuntary, or done with probable cause to believe the land was the defendant's own.⁸ Likewise, under a statute providing for treble damages for the removal of, destruction of, or damage to trees without an owner's consent, the burden is on a defendant seeking to avoid treble damages to prove, by clear and convincing evidence, that the trespass was casual and involuntary and the result of good-faith negligence.⁹

The burden is also on a civil defendant to show that his or her trespass was innocent¹⁰ or done with probable cause to believe the land was the defendant's own.¹¹ It is the burden of a defendant asserting consent as a defense to an action for trespass to plead and prove it.¹²

Similarly, the defendant has the burden of proof on the affirmative defenses of casual trespass or probable cause.¹³ Thus once the plaintiff has proven trespass and the damages, the burden shifts to the defendant to show that the trespass was casual or involuntary.¹⁴

Practice Tip:

Inasmuch as the party moving for summary judgment has the burden of proof on the motion to obtain summary judgment in an action for trespass, the plaintiff must establish that the defendant trespassed on the land and that there is no genuine issue of material fact with respect to one or more of the essential elements of the defense.¹⁵

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Footnotes

- 1 [Zagaroli v. Pollock](#), 94 N.C. App. 46, 379 S.E.2d 653 (1989) (by implication); [Johns v. Shaler Tp.](#), 240 Pa. Super. 129, 368 A.2d 339 (1976).
In the context of a property owners' trespass claim against a chemical refiner in connection with the refiner's operation of wells for the disposal of manufacturing byproducts, the property owners bore the burden of proving all the elements of their claim despite their contention that the refiner had unique access to data regarding its wells such that it bore the burden of proving that no trespass occurred. [Chance v. BP Chemicals, Inc.](#), 77 Ohio St. 3d 17, 1996-Ohio-352, 670 N.E.2d 985 (1996).
- 2 [Chauvin v. Shell Oil Company](#), 231 So. 3d 903 (La. Ct. App. 5th Cir. 2017), writ denied, 233 So. 3d 607 (La. 2018).
- 3 [Boyne v. Town of Glastonbury](#), 110 Conn. App. 591, 955 A.2d 645 (2008); [Jaycox v. E.M. Harris Bldg. Co.](#), 754 S.W.2d 931 (Mo. Ct. App. E.D. 1988); [Zagaroli v. Pollock](#), 94 N.C. App. 46, 379 S.E.2d 653 (1989) (by implication).
- 4 [Sentry Enterprises, Inc. v. Canal Wood Corp. of Lumberton](#), 94 N.C. App. 293, 380 S.E.2d 152 (1989); [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015).
- 5 [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015).
- 6 [Rosenthal v. City of Crystal Lake](#), 171 Ill. App. 3d 428, 121 Ill. Dec. 869, 525 N.E.2d 1176 (2d Dist. 1988).

The burden rests with a trespasser to establish that he or she was an innocent trespasser, and the question as to whether the person met that burden is for the jury to determine. [LN West Paces Ferry Associates, LLC v. McDonald](#), 306 Ga. App. 641, 703 S.E.2d 85 (2010).

[Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015).

[Jongeward v. BNSF R. Co.](#), 174 Wash. 2d 586, 278 P.3d 157 (2012).

[Emerick Gross Real Estate, L.P. v. George A. Fuller Const. Management, Inc.](#), 76 A.D.3d 702, 907 N.Y.S.2d 66 (2d Dep't 2010).

[Young v. Faulkner](#), 228 Ga. App. 587, 492 S.E.2d 331 (1997).

[Hill v. Cox](#), 110 Wash. App. 394, 41 P.3d 495 (Div. 3 2002).

As to the effect of mistaken belief in authority, see § 98.

[Grygiel v. Monches Fish & Game Club, Inc.](#), 2010 WI 93, 328 Wis. 2d 436, 787 N.W.2d 6 (2010).

[Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986).

[Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986); [Property Owners Ass'n of Harbor Acres, Inc. v. Ying](#), 137 A.D.2d 509, 524 N.Y.S.2d 252 (2d Dep't 1988); [Hill v. Cox](#), 110 Wash. App. 394, 41 P.3d 495 (Div. 3 2002).

[Steel Creek Development Corp. v. Smith](#), 300 N.C. 631, 268 S.E.2d 205 (1980) (equitable estoppel).

End of Document

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75 Am. Jur. 2d Trespass § 191

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

2. Burden of Proof

§ 191. Burden of proving damages in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44

A party who sues for damages for a trespass has the burden of showing the amount of the loss in the manner in which the jury or the trial judge in a nonjury case can calculate the amount of the loss with a reasonable degree of certainty.¹ More specifically, the traditional measure of damage to real property due to trespass is the lesser of the diminution in value of the property or the cost to repair, with the plaintiff bearing the burden to prove one or the other.²

Where statutory multiple damages are claimed, the burden of proving that the trespass was committed with the intent required by the statute, or without the consent of the owner, is upon the plaintiff.³ Similarly, to recover punitive damages for trespass on real property, plaintiffs have the burden of proving that the trespasser acted with actual malice involving an intentional wrongdoing or that such conduct amounted to a wanton, willful, or reckless disregard of the plaintiffs' rights.⁴

Where a plaintiff claims damages for permanent injury to the real property as a result of the defendant's alleged trespass, the burden is on the defendant to prove that a lesser amount than that claimed by the plaintiff will sufficiently compensate for the loss.⁵

Observation:

When a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that the cost of restoration would be less.⁶

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Footnotes

- 1 [Ingram v. Summerlin](#), 179 Ga. App. 832, 348 S.E.2d 68 (1986).
- 2 [McDermott v. City of Albany](#), 309 A.D.2d 1004, 765 N.Y.S.2d 903 (3d Dep't 2003).
As to the diminution in value of real estate as a measure of damages, see §§ 106 to 109.
- 3 [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986).
As to statutory provisions for multiple damages, generally, see §§ 126 to 129.
- 4 [Ligo v. Gerould](#), 244 A.D.2d 852, 665 N.Y.S.2d 223 (4th Dep't 1997).
As to punitive damages, generally, see §§ 121 to 125.
- 5 [Property Owners Ass'n of Harbor Acres, Inc. v. Ying](#), 137 A.D.2d 509, 524 N.Y.S.2d 252 (2d Dep't 1988).
- 6 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).

End of Document

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75 Am. Jur. 2d Trespass § 192

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

2. Burden of Proof

§ 192. Burden of proving statutory elements of criminal trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44

In general, under a criminal trespass statute, in order to convict the defendant for the offense, the state is obligated to prove beyond a reasonable doubt the statutory elements of the offense.¹

Observation:

In a criminal prosecution for trespassing, where a statute requires that the state disprove beyond a reasonable doubt any affirmative defense raised at trial, notwithstanding the stipulation of the parties that the state did not have to put on a prima facie case and that the defense would put on evidence regarding the issue of whether the order to leave the subject property was lawful, the language of the stipulation would not be construed as to give it the effect of a waiver of a right not plainly intended to be relinquished; furthermore, even assuming that the defendants could relinquish their statutory right to have the state prove that the order to leave the property was lawful, such stipulation did not express a clear intention by the defendants to do so.²

In a criminal trespass case, the state does not have to prove the actual ownership of the property, only that the property belonged to someone other than the defendant.³

With respect to trespass by entering and remaining in any place as to which notice against trespass has been given by actual communication to the actor, the state is obliged to show that such person had notice against trespass⁴ beyond reasonable doubt.⁵

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Footnotes

- 1 [Johnson v. State](#), 739 P.2d 781 (Alaska Ct. App. 1987); [State v. Delgado](#), 19 Conn. App. 245, 562 A.2d 539 (1989); [R.C.W. v. State](#), 507 So. 2d 700 (Fla. 1st DCA 1987); [People v. Schmid](#), 124 A.D.2d 896, 508 N.Y.S.2d 314 (3d Dep't 1986); [City of Beachwood v. Cohen](#), 29 Ohio App. 3d 226, 504 N.E.2d 1186 (8th Dist. Cuyahoga County 1986).
- 2 [State v. Cargill](#), 100 Or. App. 336, 786 P.2d 208 (1990), *aff'd*, 316 Or. 492, 851 P.2d 1141 (1993).
- 3 [McCullough v. State](#), 268 Ga. App. 445, 602 S.E.2d 181 (2004).
- 4 [State in Interest of L.E.W.](#), 239 N.J. Super. 65, 570 A.2d 1019 (App. Div. 1990).
When premises are private and not open to the public, there is no requirement that the prosecution prove that prior written or verbal warning was given to an intruder in a trespass prosecution; additionally, the prosecutor may prove the consent or nonconsent of the occupant through circumstantial evidence. [Chambers v. City of Opelika](#), 698 So. 2d 792 (Ala. Crim. App. 1996).
As to the requirement of notice or warning under a criminal trespass statute, generally, see §§ 148 to 151.
- 5 [State v. Vlasak](#), 52 Conn. App. 310, 726 A.2d 648 (1999).
Proof of notice is essential. [State v. Braxton](#), 330 N.J. Super. 561, 750 A.2d 185 (App. Div. 2000).

End of Document

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75 Am. Jur. 2d Trespass § 193

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

2. Burden of Proof

§ 193. Burden of proving statutory elements of criminal trespass—Showing of trespass on public property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  44

When property is open to the public at the time of an alleged criminal trespass, the state has the burden of proving that a lawful order excluding the defendant from the premises issued, that the order was communicated to the defendant by a person with authority to make the order, and that the defendant defied the order.¹ The state may not satisfy its burden of proof on the issue by relying on a presumption that the public official authorized to maintain order on the premises discharged his or her responsibility, in the particular instance, in a lawful manner.² However, the state is not required to prove that the defendant defied an order to leave communicated by the owner or authorized person in order to establish a violation of a criminal trespass statute requiring only that notice not to enter be given by actual communication to the defendant.³

Observation:

A "mandatory" or "conclusive" presumption, which operates to require the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a prosecution for criminal trespass with respect to one of the elements of the crime being prosecuted because shifting the burden of production or persuasion to the defendant under such circumstances would impermissibly relieve the state of its burden of proving every element of the crime beyond a reasonable doubt.⁴

Where public property is involved, before a person may be convicted of unlawful entry, the prosecution also is required to prove an additional specific factor establishing the defendant's lack of a legal right to remain.⁵ The purpose of this requirement is to protect all citizens against capricious and arbitrary enforcement of the unlawful entry statutes by public officials so that an individual's otherwise lawful presence on public property is not conditioned upon the mere whim of a public official.⁶ The additional specific factors which must be established by the state in prosecuting a person from lawful entry on public property may consist of posted regulations, signs, or fences and barricades regulating the public's use of government property.⁷

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Footnotes

- 1 [People v. Leonard, 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 \(1984\).](#)
Where there was no evidence of any boisterous conduct, injury, threats, blocking of entrances, other persons arrested, or conduct that the defendants exceeded the restricted or limited conditions of implied consent to be on public premises, and where the alleged trespass took place in the parking lot or in a building open to the public and in a common area not inside any of the particular businesses or an abortion clinic, the evidence was insufficient to show a trespass. [St. Louis County v. Stone, 776 S.W.2d 885 \(Mo. Ct. App. E.D. 1989\).](#) As to the unlawful remaining on public property as criminal trespass, see § 167.
- 2 [People v. Leonard, 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 \(1984\).](#)
- 3 [R.C.W. v. State, 507 So. 2d 700 \(Fla. 1st DCA 1987\).](#)
- 4 [People v. Leonard, 62 N.Y.2d 404, 477 N.Y.S.2d 111, 465 N.E.2d 831, 18 Ed. Law Rep. 671 \(1984\).](#)
Although evidence was presented, in a prosecution for criminal trespass, to show that a defendant may have unlawfully been on the premises of a nursing home previously, such evidence could not be used to imply guilt as to a subsequent incidence, where the defendant's presence at that time was as consistent with innocence as with guilt, and where the prosecution introduced no evidence to show that the defendant was without privilege to be on the property in question. [City of Beachwood v. Cohen, 29 Ohio App. 3d 226, 504 N.E.2d 1186 \(8th Dist. Cuyahoga County 1986\).](#)
- 5 [Hemmati v. U.S., 564 A.2d 739 \(D.C. 1989\); U.S. v. Powell, 563 A.2d 1086 \(D.C. 1989\).](#)
- 6 [Hemmati v. U.S., 564 A.2d 739 \(D.C. 1989\).](#)
- 7 [U.S. v. Powell, 563 A.2d 1086 \(D.C. 1989\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 194

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

3. Admissibility

§ 194. Admissibility of evidence in trespass action, generally; parol evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  45 to 45(6)

Expert testimony may be available to establish damages to property in a trespass to realty case where trees are removed.¹ Similarly, opinions in a geographer's summary judgment affidavit regarding the placement of the subject area within a map describing the boundaries of a national forest were the fact-based opinions of a qualified expert and thus were permitted in the United States' action against the holders of unpatented mining claims for trespass.²

Parol evidence is not necessarily admissible in a trespass action.³ Additionally, there may be no need to read a reasonableness requirement in an easement grant and evidence of the reasonableness of the route holder utilized in accessing a pipeline was therefore properly excluded in an action for trespass.⁴

The trial court properly may exclude from the jury's consideration, in a criminal trespass case, evidence offered by the defendants concerning a defense where the evidence is insufficient as a matter of law to establish the particular defense raised.⁵

Plats to which a landowner's deed referred were admissible to show her good faith in cutting down trees on property in a dispute with an adjoining landowner and, therefore, the absence of liability for punitive damages.⁶

A trial court did not abuse its discretion in landowners' trespass and negligent construction action against a builder who built a house on adjoining property in violation of setbacks and built a crosstie wall that encroached upon their property by excluding evidence of setback violations by another builder; evidence of industry-wide carelessness was irrelevant on the issue of the builder's liability, and even if it was relevant, its probative value was outweighed by its prejudicial effect on the landowners' punitive damages claim against the builder.⁷

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Footnotes

- 1 [Klingshirn v. McNeal](#), 239 Ga. App. 112, 520 S.E.2d 761 (1999); [Callison v. Livingston Timber, Inc.](#), 849 So. 2d 649 (La. Ct. App. 1st Cir. 2003); [Property Owners Ass'n of Harbor Acres, Inc. v. Ying](#), 137 A.D.2d 509, 524 N.Y.S.2d 252 (2d Dep't 1988).
As to damages for the destruction of trees or shrubbery, see § 109.
- 2 [U.S. v. Fennell](#), 381 F. Supp. 2d 1312 (D.N.M. 2005).
- 3 [Wicker v. Harvey](#), 937 So. 2d 983 (Miss. Ct. App. 2006).
- 4 [Bergh and Misson Farms, Inc. v. Great Lakes Transmission Co.](#), 565 N.W.2d 23 (Minn. 1997).
- 5 [State v. Drummy](#), 18 Conn. App. 303, 557 A.2d 574 (1989).
- 6 [Clark v. Stafford](#), 239 Ga. App. 69, 522 S.E.2d 6 (1999).
As to punitive damages, generally, see §§ 121 to 125.
- 7 [D.G. Jenkins Homes, Inc. v. Wood](#), 261 Ga. App. 322, 582 S.E.2d 478 (2003).

End of Document

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75 Am. Jur. 2d Trespass § 195

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure


C. Evidence

3. Admissibility

§ 195. Admissibility of evidence as to character of parties in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  45 to 45(6)

Evidence of a landowner's prior and subsequent difficulties with a neighbor and others regarding the use of a road across the landowner's property was admissible, in the landowner's action against the neighbor for trespass; the evidence might have showed a similar transaction, intent, reputation for violence, easement by use, or provided grounds for impeachment.¹

A trial court could admit evidence that an adjacent landowner, claimed to have intentionally trespassed on an owner's property by clearing land and destroying trees to create deer blinds, had clear-cut his own property, leaving few trees for transplanting to the owner's land; the evidence was relevant to show the availability of native trees for transplanting, and to the extent that the evidence improperly suggested that the adjacent landowner was a bad person, the resultant prejudice was cured by the trial court's instruction that the adjacent landowner's actions on his own property were not relevant to only the issue of the case, which was damages.²

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Footnotes

¹ [Hand v. Pettitt, 258 Ga. App. 170, 573 S.E.2d 421 \(2002\).](#)

² [Szymanski v. Brown, 221 Mich. App. 423, 562 N.W.2d 212 \(1997\).](#)

End of Document

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75 Am. Jur. 2d Trespass § 196

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure

C. Evidence

3. Admissibility

§ 196. Admissibility of evidence as to attendant circumstances in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  45 to 45(6)

When the plaintiff claims exemplary damages, any facts tending to show the motives and intent of the defendants in entering upon the plaintiff's premises are admissible in evidence.¹ It is competent to show the good faith of the defendant when the presence of a bad motive will tend to increase the damages.²

Where punitive damages are at issue, evidence of the defendant's net worth is admissible.³

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Footnotes

- ¹ [Ansay v. Boecking-Berry Equipment Co.](#), 450 F.2d 433 (10th Cir. 1971).
Defendant abortion protestors in a trespass action by a clinic which performed abortions were entitled to present evidence of the protestors' religious motives, but only in connection with punitive, not actual, damages; the religious motive cannot shield the defendants from the consequences of an otherwise unlawful activity, but the defendant's state of mind is admissible with respect to an award of punitive damages. [Palmetto State Medical Center, Inc. v. Operation Lifeline](#), 117 F.3d 142 (4th Cir. 1997).
As to punitive damages, generally, see §§ 121 to 125.
- ² [Ansay v. Boecking-Berry Equipment Co.](#), 450 F.2d 433 (10th Cir. 1971).
- ³ [Rodrian v. Seiber](#), 194 Ill. App. 3d 504, 141 Ill. Dec. 585, 551 N.E.2d 772 (5th Dist. 1990).

End of Document

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75 Am. Jur. 2d Trespass § 197

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

VII. Practice and Procedure


C. Evidence

3. Admissibility

§ 197. Admissibility of testimony of party in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Trespass](#)  45 to 45(6)

A property owner is competent to testify as to the market value of his or her property.¹

The jury could properly base an award of damages, in an action for trespass, upon the opinion testimony of the plaintiff regarding the fair rental value of the property which the defendant trespassed upon where the plaintiff demonstrated sufficient personal knowledge to testify regarding his opinion under the rule requiring that opinion testimony from a lay witness is admissible only when rationally based on the perception of the witness.² However, the mere fact that a property owner's estimate of the value of felled trees was an approximation is not fatal to a damages award based on that estimate.³

A property owner's testimony about diminution in the value of his or her property resulting from a trespassers' work on a road that cut across his or her property was an adequate basis for a damage award for trespass.⁴

A trial court could exclude a landlord's offer of evidence regarding the intentional nature of an adjacent landowner's trespass on the landowner's property and evidence that the adjacent landowner was an insurance agent; the adjacent landowner had stipulated that the trespass was intentional and his occupation was irrelevant.⁵

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Footnotes

¹ [Williams v. Allied Automotive, Autolite Div.](#), 704 F. Supp. 782 (N.D. Ohio 1988).

² [Zagaroli v. Pollock](#), 94 N.C. App. 46, 379 S.E.2d 653 (1989).

As to a loss of rental or usable damages as a measure of damages, see § 108.

3 [McNamara v. Moses](#), 146 N.H. 729, 781 A.2d 1015 (2001).

As to the damages for destruction of trees or shrubbery, see § 109.

4 [Glidden v. Belden](#), 684 A.2d 1306 (Me. 1996).

As to the diminution of value of real estate as measure of damages, see §§ 106 to 109.

5 [Szymanski v. Brown](#), 221 Mich. App. 423, 562 N.W.2d 212 (1997).

End of Document

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75 Am. Jur. 2d Trespass Correlation Table

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

[Topic Summary](#)**Correlation Table****Trespass**

This table shows where the subject matter in the various sections of the former edition of American Jurisprudence 2d is set forth in this revised volume. This table enables the user to translate references found in the prior edition and other legal publications into references to this edition.

Where the subject matter of a particular section of the prior edition of the article is now treated in another article, the title and section of that article is given. The reader should always consult the volume index for detailed information.

20071
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32**2018**[§1](#)
[§2](#)
[§3](#)
[§5](#)
[§9](#)
[§10](#)
[§11](#)
[§12](#)
[§7](#)
[§8](#)
[§13](#)
[§14](#)
[§15](#)
[§16](#)
[§17](#)
[§18](#)
[§19](#)
[§20](#)
[§21](#)
[§22](#)
[§23](#)
[§24](#)
[§30](#)
[§27](#)
[§28](#)
[§26](#)
[§29](#)
[§31](#)
[§32](#)
[§33](#)
[§34](#)
[§35](#)

33	§36
34	§37
35	§38
36	§39
37	§40
38	§41
39	§42
40	§43
41	§44
42	§45
43	§46
44	§47
45	§48
46	§49
47	§50
48	§51
49	§52
50	§53
51	§54
52	§55
53	§56
54	§57
55	§58
56	§59
57	§60
58	§61
59	§62
60	§63
61	§64
62	§65
63	§66
64	§67
65	§68
66	§69
67	§70
68	§71
69	§72
70	§73
71	§74
72	§75
73	§76
74	§77
75	§78
76	§79
77	§80
78	§81
79	§82
80	§83
81	§84
82	§85
83	§86
84	§87
85	§88
86	§89
87	§90
88	§91
89	§92
90	§93

91	§95
92	§96
93	§97
94	DELETED
95	§98
96	§99
97	§100
98	§101
99	§102
100	§103
101	§104
102	§105
103	§106
104	§107
105	§108
106	§109
107	§110
108	§111
109	§112
110	§113
111	§114
112	§115
113	§116
114	§117
115	§117
116	§118
117	§119
118	§120
119	§121
120	§122
121	§123
122	§124
123	§125
124	§126
125	§127
126	§128
127	§129
128	§130
129	§131
130	§131
131	§132
132	§133
133	§134
134	§135
135	§136
136	§136
137	§137
138	§138
139	§140
140	§141
141	§142
142	§143
143	§144
144	§145
145	§146
146	§147
147	§148
148	§149

149	§150
150	§151
151	§152
152	§153
153	§154
154	§155
155	§156
156	§157
157	§158
158	§159
159	§160
160	§161
161	§162
162	§163
163	§164
163	§165
164	§166
165	§167
166	§168
167	§169
168	§170
169	§171
170	§172
171	§173
172	§174
173	§175
174	§176
175	§177
176	§178
177	§179
178	§180
179	§181
180	§182
181	§183
182	§184
183	§185
184	§186
185	§187
186	§188
187	§189
188	§190
189	§191
190	§192
191	§193
192	§194
193	§195
194	§196
195	§197

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